TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1959

No. 98

UNION PACIFIC RAILROAD COMPANY,
APPELLANT,

vs.

UNITED STATES OF AMERICA.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA

FILED JUNE 8, 1959
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SUPREME COURT OF THE UNITED STATES

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[fol. 1] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA

WESTERN DIVISION

Civil Action No. 1-299

UNITED STATES OF AMERICA, Plaintiff,

v.

UNION PACIFIC RAILROAD COMPANY, Defendant.

COMPLAINT—Filed December 23, 1957

The United States of America, by its attorneys, acting under the direction of the Attorney General of the United States, brings this action against the defendant and complains and alleges as follows:

I

Jurisdiction and Venue

1. This action is brought under the authority of Section 3 of the Act of Congress known as the "Elkins Act," approved February 19, 1903, as amended (32 Stat. 847, 848, 49 U.S.C. 43), to enjoin the defendant common carrier from giving any rebate or concession, or practicing any discrimination in respect to regular tariff charges for the interstate transportation of lumber by railroad, and from adopting and utilizing any scheme or device by which special privileges and advantages are granted or discrimination practiced by the carrier in respect to lumber shipments, which privilege, advantage, or discrimination results in the failure to observe strictly the published tariffs in violation of the provisions of Section 6(7) of the Inter-

state Commerce Act, approved February 4, 1887, as amended (24 Stat. 379, 380, 381; 49 U.S.C. 6(7), and the "Elkins Act", as amended (32 Stat. 847, 49 U.S.C. 41-43).

[fol. 2] 2. Defendant, Union Pacific Railroad Company, is a corporation organized under the laws of the State of Utah, and is a common carrier by railroad and, in conjunction with other common carriers by railroad, operates through routes and publishes and files with the Interstate Commerce Commission tariffs naming local and joint rates for the transportation of property in interstate and foreign commerce. Among the points to and from which said defendant transports property in interstate and foreign commerce is Council Bluffs, Iowa, within the Southern District of Iowa.

II

The Commerce Involved

3. For a long period of time, and particularly since September 21, 1949, up to the date of the filing of the complaint, defendant, a common carrier by railroad is and has been engaged in the interstate transportation of property, including lumber, under the tariffs and concurrences in tariffs, duly filed by defendant with the Interstate Commerce Commission, which tariffs prescribed regular charges, rules, and regulations for the interstate shipment of property. During the above-mentioned period of time, the defendant, in order to attract certain lumber traffic to its lines, offered to transit wholesalers of lumber a special delayed service whereby the defendant carrier intentionally delayed specific shipments of lumber in transit on its lines in order that the lumber wholesaler might have additional time within which to find a market for such lumber. As a further part of this special service, when the transit wholesaler by means of a diversion order requested prompt [fol. 3] delivery of the shipment, the defendant carrier would remove a "transit car of lumber" from the delayed service and move it forward in the carrier's regular service toward destination.

III

Modus Operandi

4. During the period September 21, 1949, to date, many of the lumber shipments which were accorded defendant's delayed service were received on defendant's lines at Ogden, Utah, and consigned to Council Bluffs, Iowa. From 1949 to about August, 1950, the defendant offered a delayed service known as SMX service, wherein the delay was effected by setting loaded cars out on various sidings along the main line, where the cars could be restored to normal service whenever the shipper found a sale.

On or about October 2, 1951, the defendant carrier modified its delayed procedure. Under the modified procedure, the transit lumber shipper seeking delayed service had only to place the code words "route via Ellis" on the bill of lading and shipping order. Upon receipt of such a "via Ellis" shipment, the defendant moved the shipment by way of Ellis, Kansas, which is 317 miles out of the direct line haul between Ogden and Council Bluffs, and combined this circuitous routing with the practice of setting the lumber cars out on sidings en route in order to achieve a 12-day delayed service. A subsequent change of the delay procedure on or about December 12, 1953, retained the code words "via Ellis" to designate slow shipments, but instead of moving the shipments by way of the circuitous Ellis [fol. 4] routing, the defendant carrier moved the cars along the direct route between Ogden and Council Bluffs and effected a 14-day delayed service by setting the cars out on sidings along the main line.

The last-mentioned method of delaying shipments continued until about June 13, 1956, at which time defendant suspended its delayed service due to the issuance of the Interstate Commerce Commission's Service Order No. 910 prohibiting the intentional delay of freight shipments while in transit. On December 7, 1956, when the temporary Service Order No. 910 was vacated, defendant reinstated its delayed service on a 14-day schedule between Ogden, Utah, and Council Bluffs, Iowa, changed the code word indicating that slow service was desired to "via Colby", and accomplished the delay by setting the lumber cars out on sidings

along its direct route between the point of origin and point of destination. The normal freight movement between Ogden, Utah, and Council Bluffs, Iowa, averages two to four days as compared to the 14-day delayed service offered by the defendant.

IV

Offenses Charged

5. The defendant carrier in conjunction with other common carriers has filed and published at all times mentioned herein, and now files and publishes with the Interstate Commerce Commission as required by law, tariffs of rates and charges, rules and regulations governing the line-haul transportation service and accessorial services including diversion, reconsignment, and demurrage applicable to [fol. 5] lumber in carload lots transported from points in Oregon, Washington, and other western States, but none of the tariffs so filed and published specify and provide for any privileges, rules, regulations, or charges for expedited transportation service, delayed transportation service, or other transportation service whereby defendant and other common carriers are required to transport lumber or any other property by any particular train, or in time for any particular market, or otherwise than with reasonable dispatch.

6. The defendant carrier during the period September 21, 1949, to date, except as indicated above, granted the privilege of delayed lumber freight service to certain shippers and wholesalers of lumber, which service, in addition to the aforesaid delay, involved "in car" storage facilities. The said privilege of delayed service and the facility of "in car" storage are not provided for in defendant's tariffs and were given without charge.

7. Complainant therefore alleges that the granting by the defendant to certain lumber shippers and wholesalers, of a special delayed service in the movement of "in transit lumber", without charge and not pursuant to specific tariff provision, constitutes, and in the future will be, the granting and giving of concessions and discriminations in respect

to the transportation of property in interstate commerce whereby said property is, and in the future will be, transported by the defendant in interstate commerce for the transit lumber shipper or wholesaler at less rates than those named in the aforesaid tariffs lawfully filed and pub-
[fol. 6] lished as required by law; and whereby advantages are given to and discriminations are practiced in favor of the transit lumber shipper or wholesaler, in violation of Section 1 of the Act of Congress of February 19, 1903, as amended, known as the Elkins Act.

8. Complainant further alleges that the granting by the defendant to certain lumber shippers and wholesalers of a special delayed service in the movement of "in transit lumber", without charge and not pursuant to specific tariff provision, constitutes, and in the future will be, the extension to transit lumber shippers and wholesalers of privileges and facilities in the transportation of property which are not specified in the tariffs, in violation of Section 6(7) of the Act of Congress of February 4, 1887, known as the Interstate Commerce Act.

V

Effect of the Violations

9. The aforesaid delayed lumber freight service provided by the defendant carrier has had and will continue to have the following effects among others:

(a) The defendant carrier contributes its trackage and cars to provide a storage facility for transit lumber shippers and wholesalers, thus assuming certain warehousing and inventory maintenance costs of the lumber business at no expense to the lumber dealer;

(b) The defendant's contribution of trackage and cars to the lumber dealers operating costs results in a loss of transportation facilities to the shipping public in the form
[fol. 7] of freight car shortages;

(c) The defendant's unnecessary setting out of freight cars on sidings results in added carrier operational problems such as additional need for power and working crews;

(d) The defendant's delaying service entails the payment of excessive per diem cost for the use of foreign cars on defendant's line with the resulting tendency to unbalance the defendant's annual per diem offsets with other railroads to the economic disfavor of defendant and to the detriment of the national policy to maintain economically stable transportation facilities.

(e) The defendant's delaying service for lumber as set forth above constitutes a device whereby certain transit lumber dealers avoid the payment of demurrage and obtain certain other advantages which place them in a superior competitive position in the marketing of lumber.

Prayer

Wherefore the Plaintiff Prays:

1. That the Court adjudge and decree that the delayed lumber service offered and granted by the defendant in the manner hereinabove described constitutes the granting and giving of concessions and discriminations in respect to the transportation of property in interstate commerce whereby said property is transported at a less rate than that named in the tariffs published and filed by the defendant carrier; and whereby advantages are given to and discriminations [fol. 8] are practiced in favor of transit lumber shippers and wholesalers, in violation of Section 1 of the Elkins Act.

2. That the Court adjudge and decree that the delayed lumber freight service offered and granted by the defendant in the manner hereinabove described constitutes the extension to shippers of privileges and facilities in the transportation of property not specified in the tariffs which defendant has published and filed with the Interstate Commerce Commission, in violation of Section 6(7) of the Interstate Commerce Act.

3. That the Court specifically adjudge and decree that the use by defendant of illogical and unpractical internal circuitous routes in the transportation of shipments of lumber over its lines of railroad for the purpose of delaying such shipments as hereinabove described constitutes a de-

vice by which to grant the concession of intentional slow service, in violation of Section 1 of the Elkins Act.

4. That the defendant common carrier and its officers, agents, and servants be permanently enjoined from extending to any shipper or person any privileges or facilities in the transportation of shipments of lumber, except such as are specified in the tariffs defendant has published and filed with the Interstate Commerce Commission.

5. That the defendant common carrier and its officers, agents, and servants be permanently enjoined from offering and granting delayed lumber freight service, directly or indirectly, by or through any means or device whatsoever, and from pursuing any course of conduct having the purpose or effect of continuing or renewing any violations of the character hereinbefore alleged;

[fol. 9] 6. That the plaintiff have such other and further relief as is just;

7. That plaintiff recover its costs herein.

Roy L. Stephenson, United States Attorney for the Southern District of Iowa, Robert J. Spayde, Assistant U. S. Attorney, John C. Stevens, Assistant U. S. Attorney, Attorneys for the Plaintiff, 202 U. S. Court House, Des Moines, Iowa.

[fol. 10] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

WESTERN DIVISION

Civil Action No. 1-299

[Title omitted]

DEFENDANT'S ANSWER TO COMPLAINT—Filed January 10, 1958

Answering the allegations of the complaint filed against it in the above action defendant, Union Pacific Railroad Company, says:

First Defense

1. Answering paragraph numbered "1" of the complaint, defendant admits jurisdiction and venue, but denies that it is giving any rebate or concession, or practicing any discrimination in respect to charges for the interstate transportation of lumber by railroad, or adopting or utilizing any scheme or device by which special privileges or advantages are granted or discrimination practiced by it in respect to lumber shipments, or failing to observe strictly any published tariffs, in violation of the provisions of law mentioned in said paragraph "1".

2. Answering paragraph numbered "2" of the complaint, defendant admits the allegations thereof, but for more complete answer thereto it alleges that defendant operates nearly 10,000 miles of railroad between Seattle, Washington, Ogden and Salt Lake City, Utah, and Los Angeles, California, through Wyoming, Colorado, Nebraska and Kansas to Council Bluffs, Iowa, and Kansas City, Missouri.

3 and 4. Answering paragraphs numbered "3" and "4" of the complaint, defendant admits that the facts therein stated are true, but denies that those paragraphs contain [fol. 11] or set forth a full, complete or accurate description of the commerce and transportation service or the "modus operandi" involved, and for a full, complete and accurate description thereof defendant alleges that:

a. Under certain circumstances, commercial marketing and distribution practices require a flexibility in the schedules and transit time utilized by shipments during transportation from place of production to place of consumption, for example, the unpredictable crop maturity of perishable food-stuffs.

b. The use by shippers of circuitous routing in circumstances where necessary to obtain longer transit time is an established practice of long standing. To compete with longer routes for traffic requiring such longer transit time, the shorter route railroads must render a service slower than normally accorded traffic not requiring such service. Defendant, as one such shorter route railroad, has pro-

vided such slower service for at least the past 20 years, designating such service as "SMX", an abbreviation meaning "slow manifest service". During World War II, defendant suspended its "SMX" schedules.

c. In order to produce the vast quantity of lumber required during World War II, numerous small lumber mills commenced operation in the Northwest area of the United States, mainly in northern California, Oregon and Washington. These mills did not have any established commercial market as their production was primarily for war requirements. To remain in business when the war demand ended it was necessary for these small mills to develop a method of merchandising adaptable to their operations, and the so-called "roller" method of lumber marketing resulted. In this type of marketing, a negotiable instrument covering the shipment is turned over to wholesalers or brokers who endeavor to locate a purchaser while the shipment is moving eastward. When a sale is consummated the transfer to the buyer is accomplished through a diversion or reconsignment instructions to the railroad while the shipment is en route.

[fol. 12] d. Such diversion or reconsignment is a well-established commercial practice of long standing and is fully authorized by railroad tariffs duly published and filed with the Interstate Commerce Commission.

e. Many thousands of carloads of lumber are produced and moved by railroad from the Northwest area named in paragraph "c" above. Most of the lumber involved in the complaint moves to markets in the United States east of the Missouri and Mississippi Rivers over the lines and routes of several railroads which directly serve the Northwest area and which, with connecting lines, form numerous through routes with equal joint rates applicable thereto.

f. The routes so formed vary in length and some of them are much longer than others; some of the routes and the railroads participating therein between representative Northwest origins and Chicago, for example, being as follows:

Authorized Tariff Routes From Portland, Ore. to Chicago, Ill.

Route	Miles	Miles Longer than Un. Pac. route
Union Pacific Railroad Company to Council Bluffs, Iowa, thence Chicago, Milwaukee, St. Paul & Pacific Railroad Company	2259	—
Southern Pacific Company to Ogden, Utah, Union Pacific Railroad Company to Council Bluffs, Iowa, thence Chicago, Milwaukee, St. Paul & Pacific Railroad Company	2584	325
Southern Pacific Company to Ogden, Utah, The Denver and Rio Grande Western Railroad Company via Pueblo, Colorado, to Denver, Colorado, thence Chicago, Burlington & Quincy Railroad Company	2907	648
Southern Pacific Company to Tucumcari, New Mexico, thence Chicago, Rock Island & Pacific Railroad Company	3349	1090
Southern Pacific Company to El Paso, Texas, Texas & New Orleans Railroad Company to Corsicana, Texas, St. Louis South Western Railway Company to East St. Louis, Illinois, thence Wabash Railroad Company	3823	1564

[fol. 13]

From Eugene, Ore. to Chicago, Ill.

Southern Pacific Company to Ogden, Utah, Union Pacific Railroad Company to Council Bluffs, Iowa, thence Chicago, Milwaukee, St. Paul & Pacific Railroad Company	2456	—

From Eugene, Ore. to Chicago, Ill. (cont.)

Route	Miles	Miles Longer than Un. Pac. route
Southern Pacific Company to Ogden, Utah, The Denver and Rio Grande Western Railroad Company via Pueblo, Colorado, to Denver, Colorado, thence Chicago, Burlington & Quincy Railroad Company	2779	323
Southern Pacific Company to Tucumcari, New Mexico, thence Chicago, Rock Island & Pacific Railroad Company	3225	769
Southern Pacific Company to El Paso, Texas, Texas & New Orleans Railroad Company to Corsicana, Texas, St. Louis South Western Railway Company to East St. Louis, Illinois, thence Wabash Railroad Company	3699	1243

From Grants Pass, Ore. to Chicago, Ill.

Southern Pacific Company to Ogden, Utah, Union Pacific Railroad Company to Council Bluffs, Iowa, thence Chicago, Milwaukee, St. Paul & Pacific Railroad Company	2476	—
Southern Pacific Company to Ogden, Utah, The Denver and Rio Grande Western Railroad Company via Pueblo, Colorado, to Denver, Colorado, thence Chicago, Burlington & Quincy Railroad Company	2799	323
Southern Pacific Company to Tucumcari, New Mexico, thence Chicago, Rock Island & Pacific Railroad Company	3081	605

From Grants Pass, Ore. to Chicago, Ill. (cont.)

Route	Miles	Miles Longer than Un. Pac. route
Southern Pacific Company to El Paso, Texas, Texas & New Orleans Railroad Company to Corsicana, Texas, St. Louis South Western Railway Company to East St. Louis, Illinois, thence Wabash Railroad Company	3551	1075
[fol. 14] Southern Pacific Company to Deming, New Mexico, The Atchison, Topeka & Santa Fe Railway to Snyder, Tex., Roscoe, Snyder & Pacific Railway Company to Roscoe, Tex., The Texas & Pacific Railway Company to Sweetwater, Tex., Panhandle & Santa Fe Railway Company to Alpine, Tex., Texas & New Orleans Railroad Company to San Antonio, Tex., Missouri Pacific Railroad Company to Fort Worth, Tex., Missouri-Kansas-Texas Lines to Kansas City, Missouri, Union Pacific Railroad Company to Council Bluffs, Iowa, thence Chicago, Milwaukee, St. Paul & Pacific Railroad Company	4533	2057

g. Freight rates and charges for transporting lumber and the privilege of reconsigning or diverting while in transit are the same over all the routes just described and numerous other routes to any particular eastern destination, but the time utilized in transit by the longer routes is materially greater.

h. When shipments of "roller" lumber traffic, such as described in paragraph "e" above, are originated, shippers exercise their right under Section 15(8) of the Interstate Commerce Act (49 U. S. Code, Sec. 15(8),) to route

them over the longer or more circuitous routes requiring more time in transit, which will permit them to find buyers while the shipments are moving eastward; and, in such circumstances, the lumber traffic is lost to the shorter routes because of the longer time in transit utilized by the longer routes.

i. Establishment and maintenance at the same regular tariff rates, fares and charges, by defendant and other railroads of fast, slow or different speeds of freight and passenger train schedules and services, adjusted to the desires or needs of patrons or for competition between competing lines and routes of railroad, is a practice that has long prevailed in competitive railroad transportation operations in the United States.

[fol. 15] j. In the circumstances described in paragraph "h" above, defendant, being a participant in the shorter and faster routes to the east which were losing traffic to the longer and slower routes, as a means to more nearly equalize the transit time and thus to compete for the traffic, reinstated "SMX" schedules September 21st, 1949 for the movement of lumber and other traffic requiring slower than normal service.

k. In "SMX" service, shipments are moved from division or sub-division terminals to the next sub-division or division terminal in local or "drag" trains regularly operated in the normal process of moving the available traffic, rather than in through trains. The schedule in "SMX" service between Ogden, Utah and Council Bluffs, Iowa, for example, is 9 days.

l. Because of an acute car shortage then prevailing and in an effort to assist in obtaining greater utilization of the car supply then available, defendant voluntarily suspended "SMX" schedules effective 11:59 PM, July 31st, 1950.

m. During the ensuing fourteen months shippers increasingly routed their traffic via the longer and slower routes, thus depriving defendant of participation in such traffic. In a further, and modified, effort again to com-

pete with the longer routes, defendant on October 2nd, 1951 undertook to handle over a parallel line of its railroad via Ellis, Kansas, traffic so routed by shippers, which routing would require two additional days over normal schedule when interchanged to connecting carriers at Kansas City, Missouri, or three additional days over normal schedule when interchanged to connecting carriers at Council Bluffs, Iowa.

n. Defendant admits that train operations over its main line are more economical than over the longer route through Kansas, and, in order to effect economies in operation, the actual physical handling via Ellis, Kansas of traffic so routed was discontinued on December 12, 1953, and a [fol. 16] "lumber special" service was inaugurated for main-line operation in which traffic requiring slow service was assembled into trains and moved from terminal to terminal in much the same manner as "SMX" service had formerly been operated, but on a schedule comparable to that which had been obtained during the physical movement via Ellis. Use of "via Ellis" routing on bills of lading was continued by shippers to designate traffic on which slow service was required.

o. Substantial loss of traffic by defendant to longer and slower competing routes continued, and to again attempt to meet this competitive situation the schedule for "lumber special" service was changed on January 6th, 1954 to twelve days, Ogden to Council Bluffs. Since that schedule too was still too fast to recoup its traffic losses to the longer routes, defendant on February 15th, 1954, changed the schedule to fourteen days.

p. On March 19th, 1956, the Interstate Commerce Commission issued its Service Order No. 910, to become effective 12:01 AM, April 9th, 1956. This service Order prohibited railroads from willfully delaying "the movement of loaded freight cars by holding such cars in yards, terminals, or sidings for the purpose of increasing the time in transit of such loaded cars"; prohibited setting out loaded cars between terminals except in cases of emergencies or sound operating requirements; prohibited back-

hauling loaded cars for the purpose of increasing the time in transit; and prohibited the use of any route other than its usual and customary fast freight route from point of receipt of the car from consignor or connecting railroad carrier to point of delivery to consignee or connecting carrier. The operation of all rules and regulations (such as tariff rules and regulations) in conflict with Service Order No. 910 were placed in suspension.

q. In Civil No. 8541, the United States District Court for the District of Oregon issued a Temporary Restraining Order at 4:40 PM, April 7th, 1956 enjoining the enforcement of Service Order No. 910 pending hearing and [fol. 17] determination by a full three-judge Court on a shipper plaintiff's complaint for an interlocutory injunction. In Memorandum Opinion dated May 31st, 1956 the full Court dismissed the complaint and vacated the temporary restraining order. The Interstate Commerce Commission subsequently released at 4:00 PM, June 13th, 1956 a notice that Service Order No. 910 would be enforced on and after that date.

r. With the effectiveness of Service Order No. 910 reinstated on June 13th, 1956, defendant completely discontinued any slow service whatsoever and abandoned the "via Ellis" routing arrangement.

s. On July 2nd, 1956, a letter by the Director, Bureau of Safety and Service, Interstate Commerce Commission, announced an interpretation that "Service Order No. 910 does not prohibit railroads from accepting shipments which are routed under present applicable tariff routes." This letter specifically approved the use by certain railroads of alternate interior routes over their individual railroad, and, as such, constituted a modification of the prohibition in Service Order No. 910 itself against the use of "any route other than its usual and customary fast freight route" and the suspension of tariff provisions so providing, as mentioned in paragraph "p".

t. Under date of July 24th, 1956, defendant advised the Chairman of the Interstate Commerce Commission that during the first month in which Service Order No.

910 was operative, conservative estimates indicated it had been deprived of participation in a minimum of 1,542 carloads which it would normally have handled and on which its revenue, based on the then-prevailing average revenue per car handled, was calculated at approximately $506,000 for the one month. In the advice to the Interstate Commerce Commission information was presented showing the renewed use by shippers of routes of extreme circuity to accomplish longer transit time and information was requested concerning action the Interstate Commerce Com- [fol. 18] mission would take to correct the condition discriminatory against defendant which continued enforcement of Service Order No. 910 created.

u. Response by the Chairman of the Interstate Commerce Commission, dated July 30th, 1956, stated Service Order No. 910 was intended to eliminate the use of freight cars as storage during the (then) present car shortage; reaffirmed that the Order does not prohibit railroads from accepting shipments which are routed under present applicable tariff routes; expressed the view that if the Order created a condition discriminatory against defendant it was due to defendant's practice of allowing certain shippers concessions in the matter of storage in transit not accorded to all shippers; advised that the Commission was having field checks made to see that Service Order No. 910 was complied with and that lumber shipments were being handled strictly in accordance with tariff routings and charges; and that any violations of the Order or failure to assess proper charges would be handled for prosecution.

v. After consideration of this response, defendant concluded that its present tariff publications did authorize the use of alternate interior routes over its line of railroad, such as excepted from Service Order No. 910 by the letters of July 2nd, 1956, mentioned in paragraph "s" and of July 30th, 1956, mentioned in paragraph "u", and it advised shippers desiring slow service that shipments routed by them via Union Pacific via Colby, Kansas would be physically handled by defendant via Colby, Kansas on

a schedule, Ogden to Council Bluffs, ranging from six to eight days.

w. When Service Order No. 910 was vacated by the Interstate Commerce Commission effective 12:01 AM, December 8th, 1956, defendant reinstated "lumber special" service via its main line on a schedule of fourteen days, Ogden to Council Bluffs, such as had been in effect prior to Service Order No. 910. Use of "via Colby" routing on bills of lading was continued by shippers to designate traffic on which slow service was required. This service is still in effect as of this date.

[fol. 19] 5. Answering paragraph numbered "5" of the complaint, defendant admits that the facts therein stated are true, but denies that any statute or other law, or any order, rule or regulation of the Interstate Commerce Commission requires defendant or any other railroad common carrier to file tariffs publishing freight train or other train schedules showing the "running time" of its trains or the time within which it may offer, undertake or propose to move shipments between points on its lines; denies that any statute or other law authorizes or empowers the Interstate Commerce Commission to issue such order, rule or regulation; and further denies that any law, order, rule or regulation requires that all shipments be moved over defendant's line or route upon the same train schedule, speed or running time, or requires the publication or collection of more or greater freight charges for moving one shipment faster or slower than another shipment.

6. Answering paragraph numbered "6", defendant admits that it has transported lumber in slower train schedules and movement than its fastest possible train schedules or running time for shippers and wholesalers of lumber indicating a desire for such slower service; that such lumber shipments were transported in freight cars furnished such shippers at regular tariff rates published and charged for transporting such lumber; and that no charge was made against the shippers for either the slow movement of such shipments or for the use of cars in which they were hauled, other than the rates and charges published in defendant's tariffs filed with the Interstate Commerce

Commission; but defendant denies that any law, order, rule or regulation requires the publication in tariffs of slow, fast, or any other schedule or type of transportation service; and denies that any law, order, rule or regulation requires defendant to publish or make any charge in addition to the published tariff rates and charges, for such slower service or for the use of cars in which lumber [fol. 20] shipments are hauled by defendant over its line. Further answering said paragraph numbered "6", defendant alleges that it has the duty as a common carrier to furnish upon reasonable request cars in which shipments are loaded, placed or "stored" for protection while in defendant's possession in the course of movement over its line, but denies that such use of cars constitutes a "storage" service or a facility for which any charge in addition to the published rates or charges for transportation should or could lawfully be made.

Further answering said paragraph numbered "6", defendant alleges that it made available to and did perform the slower freight service for all shippers desiring such service, including shippers of lumber, fruits and vegetables, and other commodities; but defendant denies that it selected or acted in collusion with "certain" shippers, as alleged or implied in the complaint, or withheld from any shippers the privilege of equally availing themselves of such slow service or the use of freight cars for such service, and denies that it performed any service or afforded any facility for any shippers at less than the regularly published tariff rates applicable via its line and available to the same shippers for the same or greater service and facilities via the longer routes described in paragraphs "3 and 4" "f" above.

7. Defendant denies the allegations and conclusions set forth in paragraph numbered "7".

8. Defendant denies the allegations and conclusions set forth in paragraph numbered "8".

9. Answering paragraph 9 of the complaint, denominated "Effect of Violations", and each subparagraph thereof, defendant specifically denies that it has been guilty of any violations whatsoever. Further answering said paragraph

and subparagraphs, defendant states that the allegations therein contained are irrelevant and immaterial and require no answer, but if the allegations of paragraph num-
[fol. 21] bered "9" and the subparagraphs thereof be held relevant or material and to require an answer, then defendant denies each and every allegation therein contained.

10. Except as herein expressly admitted, defendant denies each and every allegation of the complaint and all of the matters, things and conclusions therein alleged.

Second Defense

The complaint fails to state a claim against defendant upon which relief can be granted.

Wherefore, having fully answered, defendant prays that the complaint be dismissed with costs to the plaintiff.

Walter R. Rouse, Elmer B. Collins, James H. Anderson, 1416 Dodge Street, Omaha 2, Nebraska, Addison C. Kistle, 414 Wickham Bldg., Council Bluffs, Iowa, Attorneys for Defendant.

Certificate of Service (omitted in printing).

[fol. 22] [File endorsement omitted]

In the United States District Court
For the Southern District of Iowa

Western Division

[Title omitted]

Motion for Summary Judgment Rule 56—
Filed September 17, 1958

The plaintiff, United States of America, by its attorneys, hereby moves the court pursuant to Rule 56 of the Federal Rules of Civil Procedure to enter summary judgment in plaintiff's favor for the relief sought in the complaint, on the ground that the defendant's answer has admitted all the factual allegations of the complaint and that the affirma-

tive defenses set forth by defendant are insufficient as a matter of law; accordingly, there is no genuine issue as to any material fact, and the plaintiff is entitled to judgment as a matter of law.

This motion is based on the attached exhibits:

(A) The complaint

(B) The answer

(C) The affidavits of Messrs. David M. Laird and Harold D. McCoy

(D) Certified public documents

Roy L. Stephenson, United States Attorney for the Southern District of Iowa, John C. Stevens, As-
[fol. 23] sistant U. S. Attorney, Richard J. Wells, Assistant U. S. Attorney, Attorneys for the Plaintiff, 202 U. S. Court House, Des Moines, Iowa.

Dated: September 17, 1958.

[fol. 24]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

WESTERN DIVISION

Civil Action No. 1-299

UNITED STATES OF AMERICA, Plaintiff,

v.

UNION PACIFIC RAILROAD COMPANY, Defendant.

EXHIBIT A TO MOTION FOR SUMMARY JUDGMENT—COMPLAINT

(Omitted) Printed side folio 1, page 1, supra.

[fol. 33]

EXHIBIT B TO MOTION FOR SUMMARY JUDGMENT—
DEFENDANT'S ANSWER TO COMPLAINT

(Omitted) Printed side folio 10, page 7, supra.

[fol. 45]

EXHIBIT "C" TO MOTION FOR SUMMARY JUDGMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

WESTERN DIVISION

Civil Action No. 1-299

UNITED STATES OF AMERICA, Plaintiff,

v.

UNION PACIFIC RAILROAD COMPANY, Defendant.

AFFIDAVIT IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT

David M. Laird, being first duly sworn, deposes and says:

I am David M. Laird, Special Agent, Bureau of Inquiry and Compliance, Interstate Commerce Commission, and have personal knowledge of the facts herein set forth.

This affidavit is submitted in support of the plaintiff's motion for summary judgment herein, for the purpose of showing that there is in this action no genuine issue as to any material fact, and that plaintiff is entitled to judgment as a matter of law.

Acting upon directions emanating from the Bureau of Inquiry and Compliance, Interstate Commerce Commission, Washington, D.C., I undertook an investigation of the practices of the defendant, Union Pacific Railroad Company, in respect to the slow routing of lumber shipments via the defendant's lines from Ogden, Utah, to Council Bluffs, Iowa. The major portion of the investigation was conducted during the months of May and June, 1957. In the course of this investigation and pursuant to Section 20(5) of the Interstate Commerce Act (49 U.S.C. 20(5)), which author-
[fol. 46] izes special agents of the Commission to inspect and copy the records, memoranda, and correspondence of carriers subject to the Act, I reviewed the defendant's busi-

ness records pertaining to the systematic conduct of that portion of its business operations involving the slow routing of lumber shipments in accordance with the requests of lumber shippers or brokers. Employees of the defendant prepared accurate duplicate copies of the pertinent records, memoranda, and correspondence, which I reviewed, and they supplied me with said copies. I have listed below the documents supplied to me and have attached copies thereof to this affidavit.

List of documents supplied by the Union Pacific Railroad Company from among its business records:

1. Letter July 7, 1953, W. V. Kee, Asst. Traffic Mgr., Portland, Oreg., to C. W. Evers, Traffic Mgr., Portland, Oreg.—U.P. General Traffic Dept. File 80-199-15—Special.

2. Letter Dec. 4, 1953, A. E. Stoddard, Pres., to W. T. Burns, Vice Pres. (Traffic)—U.P. General Traffic Dept. File 80-199-15—Special.

3. Letter Dec. 7, 1953, W. T. Burns, Vice Pres. (Traffic), to A. E. Stoddard, Pres.—U.P. General Traffic Dept. File 80-199-15—Special.

3a. Letter May 1, 1952, A. J. Foley, V.P. Traffic representative, Omaha, Nebr., to Messrs. W. T. Burns, J. R. MacAnally, K. G. Carlson, R. E. Drummy, D. H. Voltz, N. B. Marvin, C. C. Weedin, T. L. Vogel, V.P. General Traffic Dept. File 80-199-15 Special.

[fol. 47] 4. Memorandum Dec. 11, 1953, N. B. Marvin, Asst. Freight Mgr., Omaha—U.P. General Traffic Dept. File 80-199-15—Special.

5. Mailgram Dec. 12, 1953, H. E. Shumway, General Mgr., to superintendents at line points—1155A.

6. Memorandum U.P. General Traffic Dept. File 80-199-15—Special. D&RI taking 12 to 14 days Ogden to Kansas City.

7. Memorandum Jan. 6, 1954, U.P. General Traffic Dept. File 80-199-15—Special.

8. Mailgram Jan. 6, 1954, H. E. Shumway, General Mgr., to Messrs. E. Hicks, J. E. Mulick, C. J. Colombo—U.P. G.S. Trans. 410-SMX.

9. Memoranda Feb. 11 and 15, 1954, N. B. Marvin, Asst. Frt. Mgr., Omaha, J. R. MacAnally, General Frt. Traffic Mgr., Omaha—U.P. General Traffic Dept. File 80-199-15—Special.

10. Letter Jan. 25, 1954, J. R. MacAnally, General Frt. Tr. Mgr., Omaha, to W. T. Burns, Vice Pres. (Traffic)—U.P. File B-95-600-20.

11. Mailgram Feb. 15, 1954, H. E. Shumway, General Mgr., to H. Hicks, J. E. Mulick, O. A. Cunningham, C. J. Colombo—U. P. General Traffic Dept. File 80-199-15—Special.

12. Letter July 9, 1954, H. E. Shumway, General Mgr., to H. Hicks—U.P. G.S. Transp. 410 SMX.

13. Letter Oct. 13, 1954, J. B. Henderson to J. R. MacAnally, General Frt. Tr. Mgr.—U.P. General Traffic Dept. File 80-199-15—Special.

14. Letter Oct. 22, 1954, H. E. Shumway, General Mgr., to J. R. MacAnally, General Frt. Tr. Mgr., Omaha —U.P. General Traffic Dept. File 80-199-15—Special.

15. Mailgram May 7, 1955, F. P. Bailius (Traffic), to Messrs. H. E. Shumway, General Mgr., H. M. Turner, A. McAllister, D. F. Wengert—U.P. General Traffic Dept. File 80-199-15—Special.

16. Letter May 30, 1955, C. W. Evers, Tr. Mgr., Portland, Oreg., to W. T. Burns (Traffic) Vice Pres.— U.P. General Traffic Dept. File 80-199-15—Special.

17. Letter May 8, 1956, T. P. Meyer to J. R. MacAnally, General Frt. Tr. Mgr.—U. P. Frt. Tr. Dept. File 52-245-910.

[fol. 48] 18. Letter July 23, 1956, J. R. MacAnally, General Frt. Tr. Mgr. to W. T. Burns, Vice Pres. (Traffic)—U. P. Frt. Traffic Dept. File 52-243-910.

19. Letter July 30, 1956, Commissioner Owen Clarke to U. P. Vice Pres. of Traffic W. T. Burns—U.P. Gen. Tr. Dept. File 52-243-910 (referred to in defendant's answer paragraphs 3 and 4U.).

20. Letter July 27, 1956, J. R. MacAnally, General Frt. Tr. Mgr. to D. R. Walker—U. P. Frt. Traffic Dept. File 52-243-910.

21. Mailgram Aug. 24, 1956, W. T. Burns, Vice Pres. (Traffic) to H. Hicks—U.P. Frt. Tr. Dept. File 52-243-910.

22. Telegram Dec. 7, 1956, J. R. MacAnally, Gen. Frt. Tr. Mgr. to line points—U.P. Frt. Tr. Dept. File 52-243-910.

23. Letter Jan. 3, 1957, C. W. Evers, Tr. Mgr., Portland, Oreg., to traffic employees—U.P. Frt. Tr. Dept. File 52-243-910.

24. Letter May 24, 1957, H. E. Shumway, General Mgr., to J. R. MacAnally, General Frt. Tr. Mgr.—U.P. G.S. Transp. 410 SMX.

25. Photostat of Operational Chart relative to Lumber Special trains moving on U.P. lines during late 1956 and early 1957, as maintained in files of the General Superintendent of Transportation, Union Pacific Railway Company.

/s/ David M. Laird
David M. Laird
Special Agent
Interstate Commerce Commission

United States of America,
Southern District of Iowa, ss.

Subscribed and sworn to before me by David M. Laird this 11th day of September, 1958.

E. E. Poston, Clerk
U. S. District Court

By /s/ Fred O. Marrone, Deputy

(Seal)

ATTACHMENT No. 1 TO AFFIDAVIT

COPY

Portland—July 7, 1953
File: E

Mr. C. W. Evers—Portland

As you know, retarded service of other lines in the handling of "roller" lumber is gaining traffic for them. Solicitation calls continue to show several concerns favor us with their firm orders and even go so far as to designate Union Pacific when cars are diverted while still on the Southern Pacific, but give their "roller" cars to others.

Shippers who keep in close touch with time in transit state routing via SP-DRGW-CRIP via Jansen and Horton to Kansas City averages 17 days with a maximum of 21, while our routing via Ellis averages about 12.

We, of course, cannot solicit via Portland, and I think we should again consider handling cars via Oakley and Colby. This line has daily (except Sunday) local service. If traffic from Denver was handled on Train 370-154 arriving Oakley at 6:50 AM, it would be too late for local train 186 which departs that point at 6:15 AM. One day would be consumed at Oakley. This train arrives Plainville at 2:30 PM. Local Train 190 departs Plainville 6 PM, arriving Salina at 11 PM, but there would seem to be no reason why traffic could not be handled instead on Local 184, departing Plainville 8:45 AM the following morning and arriving Salina 3:15 PM. Train 370-154 departs Salina at 6 PM, but again because of switching necessary to line up for this train, it would likely move the following day.

While there may be operating reasons which would prevent such handling and further complaints from members of the West Coast Lumbermen's Association might result, movement via Ellis already provides a circuitous route which has been helpful but has not put us on an equal footing with the SP-DRGW-CRIP route.

Movement via Oakley and Colby should result in 2 to 4 days additional transit time, and I am sure we could use it to good advantage in our solicitation efforts with several firms.

W. V. KEE

General Traffic Dept., Union Pacific Railroad,
File 80-199-15-Special.

[fol. 50]

ATTACHMENT NO. 2 TO AFFIDAVIT

Omaha—December 4, 1953

W.T.B. (Personal)

At the Packers' party, South Omaha Livestock Exchange, last night, several of them including Thompson of Hormel, Fremont, asked me why we could not put their meat on the same train and same schedule that we handle livestock from this area to Los Angeles. They stated that livestock shipments go through on a faster schedule, connecting with the DLS and the service is perfect. However, it was stated that we in some cases pick up meat with the livestock and the meat is set out somewhere along the line, delaying it a day in arriving at destination. South Omaha and Fremont both state that we could increase our meat shipments to the west coast by at least 20 percent if we would give them the livestock service schedule. Why can this not be done?

Paul Feucht called me from Chicago today, stating that while he was in Eugene, Oregon, he was told by the speculators that the reason they were shipping their lumber business in so-called roller cars via SP-DRGW-RI was because they get a schedule of approximately 20 days Eugene to Chicago, and since the UP-C&NW will not meet this schedule they cannot give up this business which amounts to some 800 carloads per month. Paul asked why we could not use our longer route via Colby, Kansas, and consume approximately 20 days which he claims will result in at least 500 to 600 carloads per month of this traffic coming back to UP-C&NW. If this is not desirable, is there any reason why we should not attempt our SMX schedule again

and see what we can do in recovering this high rated commodity that we have lost to the Rio Grande and Rock Island?

Since you may not want this type of communication in your file, I will destroy my copy after I have heard from you.

A.E.S.

General Traffic Dept., Union Pacific Railroad,
File 80-199-15-Special.

[fol. 51]

ATTACHMENT No. 3 TO AFFIDAVIT

COPY

Los Angeles—December 7, 1953

File: A-

PERSONAL

Mr. A. E. Stoddard:

Your letter of December 4th in regard to lumber business from Eugene, Oregon to the east:

This subject was discussed with Mr. Lynch here today and arrangements will be made to work out a service handling that will be competitive with the Rio Grande and Rock Island.

Our own people say that a conservative figure on business we could pickup on this revised schedule will be approximately 400 cars per month.

I will advise you further in regard to the meat situation.

W. T. BURNS

BCC: Mr. P. J. Lynch

General Traffic Dept., Union Pacific Railroad,
File 80-199-15-Special.

[fol. 52]

ATTACHMENT No. A-3A TO AFFIDAVIT

Omaha—May 1, 1952

Messrs:
W. T. Burns
J. R. MacAnally
K. G. Carlson
R. E. Drummy
D. H. Voltz
N. B. Marvin
C. C. Weedin
T. L. Vogel—Chicago

Following are excerpts from General Agents' monthly reports for March:

CHICAGO

Douglas Aircraft Co. has been directed by the Air Force to produce BD-66 twin-jet bombers in the plant this company originally occupied at O'Hare Field, Chicago. This will put the Chicago area in the jet airplane program for the first time. The plant and 1200 acre airport were constructed during World War II for occupancy of Douglas Aircraft Co. At that time C-54 cargo planes were built. More recently Fairchild Engine & Airplane Corpn. started production of cargo planes at this plant, but had its contract cancelled recently. The original 1200 acre airport has been turned over to the City of Chicago under the Surplus Property Act and has been expanded to more than 6000 acres which will be utilized as the Major Commercial Airport of the City. Douglas will take possession of the plant immediately for its jet program. In 1943 the plant employed approximately 15,000 persons and it is expected that approximately the same employment will again be attained.

Item 950—Forwarder Traffic (C.L.)

1952-1957	1951-2278	Decrease 321

During 1951, all forwarders had increased takings as a result of heavy movement for account of various Government agencies. This business has registered a sharp decline, resulting in decreased volume from practically all forwarders.

The above decrease is reflected principally in our takings from Acme, 506 versus 553; clipper 17 versus 46; International 223 versus 270; National 32 versus 85; P&A Shippers 102 versus 181 and Universal 688 versus 768, with varying smaller fluctuations from the other forwarders.

Universal decrease of 80 cars attributable to loss of Colorado tonnage, 80 cars last year and none this year, due to cars now moving via CB&Q.

UP Gen Traff Dept 80-199-15 Special

[fol. 53] CINCINNATI

The outlook for increased business during balance of 1952 is still predicted but miscellaneous reports from individual shippers in our territory do not seem to tie in with general predictions. For instance, Seeger Sunbeam Co., Evansville, Ind. recently laid off 800 workers account no orders. Also International Harvester, Springfield, laid off a number of employees account decrease in their orders. This shipper during March 1951 was filling numerous Government orders which were not in evidence this year. The buying public is still putting up strong resistance against sales campaigns and the retail outlets are trying desperately to get rid of large inventories accumulated a year or so ago. The people are putting their money into banks, property and investments.

The defense program will continue to build up in volume, but not as great as anticipated, because of a tendency to "stretch out" this production which will in turn increase materials for civilian supplies. It seems that the Air Corps in their desire to build up stock piles of various materials placed orders for more material than they were authorized to order and their sub-contractors in an endeavor to fill these orders in turn placed heavy orders for such critical metals as aluminum, steel, copper and other materials. When the Air Corps recently canceled a large number of these contracts, the contractors found themselves overstocked and the "hard to get materials" were released for civilian consumption.

NEW ORLEANS

Our consumers are crying for potatoes but are unable to secure them in Idaho at the ceiling price. Federal State Market News Service shows Colorado Russets selling at $7.15 and Idahos at $6.90. In order to secure potatoes they state the Idaho dealers have asked for a substantial "brokerage" fee in addition to the ceiling price.

TULSA

The Oklahoma State Supreme Court recently ordered the Frisco Railway to provide hospital facilities at four Oklahoma points (Tulsa, Oklahoma City, Enid and Huge).

ABERDEEN

There have been no further developments in oil drilling operations in this area. No work is being done at the Ocean City well and the Gas & Oil Development Co. have not yet started operations in the old "Sims" well mentioned in last month's report.

LONG BEACH

Inbound movement of automobile parts during April will be considerably less than same month last year. Ford Motor Co. production schedule will be 186 freight and passenger cars daily as compared to 245 units last year. Additional reason for decrease is that we are being penalized in percentage of total movement because Ford claims our service from Kansas City is slower than that of Santa Fe. Outbound movement via rail will be approximately 6 loads per day as compared to 11 loads last year.

Metropolitan Stevedors Co. representing C. T. Taka- [fol. 54] haski Co., Seattle, Wash. in exporting ore originating at Iron Springs, Utah through this Port to Japan advise movement will continue to be heavy and no doubt will exceed that of last year.

BOISE

The new Black Canyon Irrigation Project, located 30 miles west of Boise and which has been in production of forage crops for the past three years, will see a greatly in-

creased planting of potatoes and onions this year, and we now have one firm who intend to construct a new packing plant in the center of this project, approximately 13 miles north of Nampa. There are an estimated 26,000 acres of land in this project suitable for row crops. This area in the next few years will no doubt be one of our very substantial producers of row crops of all types grown in this territory.

It now looks like early potato acreage will be reduced in this territory 20 to 25 percent, this reduction due to the high cost of seed, which at this time commands a price of $5.75 per hundred, or approximately $75. to $100. per acre for seed alone. Reason for seed shortage account high prices paid for commercial potatoes caused many growers to sell their seed stock for edible purposes rather than retain same for seed purposes.

EUGENE

March was a rather cold month and quite a little snow fell in the foothills and higher elevations. This slowed production and orders were difficult to place. Even the smallest Western Wholesalers now feel that the only way to continue business is to get lined up to sell some "rollers". With the large mills only able to take on so much, and the small mill shipping almost entirely for the large transit wholesalers, it almost forces him to do some of this type of business.

"Rollers" moved in considerable volume during February and March. The small mill is well satisfied with this method of marketing his production. He does not have to maintain an order file of any consequence, nor does he have to carry an inventory from which to fill specified orders. He runs his logs through the mill, loads up a car with a favorable mixture, calls the tally to his wholesale outlet and sends them his bill of lading. He can either sell the wholesaler the car outright or give it to him on a consignment basis, but in either event the wholesaler will send him up to 80% of the value of the lumber within a few days after shipment. He is always on the current market and in most cases

his lumber is bringing him a premium price, either because the transit operators are bidding against each other for his lumber or because the buyer is willing to pay more for lumber rolling and only a few days from being at destination, which eliminates the necessity of consumers maintaining large inventories. The rolling railroad car is the warehouse. The wholesalers, commission men and consumers in the receiving area receive many lists of rollers and from them they are nearly always able to pick up cars almost exactly covering their requirements, and only a few days away. This beats placing firm orders which at best are usually accepted on 30 days shipment, and on a rising market often just don't get shipped. About all they submit inquiries on any more are highly specified stocks which are not found in sufficient quantities in roller cars and which they must place on a firm order basis in order to fill in their low spots. These inquiries are the [fol. 55] ones being received by the Western wholesaler who is doing only a firm order business, and quite naturally he finds it almost impossible to get them placed.

We have secured considerable of this roller traffic because of our via Ellis route which we would not otherwise have handled. As evidence of the volume during the first three months, this year we handled 1152 diversions for the first quarter, while last year we handled 602 diversions for the first quarter, nevertheless we still are not competitive with the D&RGW on this type of traffic, and this is especially true when the hottest market area is in the Southwest as it was during the period mentioned. The route of the D&RGW via Pueblo slows the traffic far enough west so that more time is allowed to sell in the entire consuming areas of Texas, Oklahoma and New Mexico. In other words, to many points in this consuming area the only available route is via Denver, and we have run into difficulty many times because our service to Denver is so fast that cars are beyond that point when sales are completed and we cannot reach desired point. As a result, cars are billed to Denver via SP-D&RGW via Pueblo, which gives 10-11

days service, or approximately the same service given on cars billed to Council Bluffs via SP-UP via Ellis. We are hopeful that as the eastern consuming area opens up more our Ellis route will prove highly satisfactory and we will be able to increase our takings on this type of traffic.

We finished the first quarter with an increase of 1113 cars of lumber. Plywood was down 14 cars, but the market is picking up on this commodity and we should hold our own as against last year now. While the consensus seems to be that the next quarter will be good so far as lumber is concerned, it is extremely doubtful that the movement will reach that of the second quarter of 1951.

FRESNO

Valencia orange tree crop estimate is now set at 4500 cars compared with 4900 cars last year. However last year because of a disease known as Septoria, between 40 and 50 percent of the crop was rendered unfit for eastern shipment and it was sent to by-products plants. The disease has not shown up this year so it is estimated that about 1900 of the 4500 cars will move by truck into by-products plants and other markets leaving a balance of 2600 cars to move by rail, and it is estimated around 1500 of these will move by SP of which we should receive around 75 percent or 1125 carloads compared with 839 cars last year, or an increase of 286 cars amounting to about 25 percent. In view of the fact that there will be no regulations governing shipments by the Orange Administrative Committee this year, it is very likely the crop will be shipped out much faster and it may also be a benefit to us because usually the early oranges picked were put into cold storage and shipments were held back until the Southern California navels were out of the way. Most of these cold storage plants were located at Exeter on the AT&SF and the cars moved out via that line. Now, however, unless the market is very unprofitable at the time the oranges are ready to move, none will need to be held back and put into storage awaiting aproprate, which will allow oranges originating at SP packing houses to move out from those houses instead of being taken from them to the cold storage plants on the AT&SF.

[fol. 56] The California Raisin Advisory Board on March 27th reported the sale of 94,813 tons of raisins during the first half of the 1951-1952 marketing season, compared with 85,441 tons for the same period a year ago, for an increase of 9,372 tons or approximately 10 percent, while on the other hand our receipts for the first 3 months of this year show 151 cars compared with 216 a year ago or a decrease of 65 cars or 20 percent. The decrease in rail shipments including our own is due to the fact that truck shipments are constantly increasing, and so have shipments by water. The truck shipments increased because of faster service and most contract truckers are hauling 30,000 lbs. of raisins and dried fruit for the same rate of rail 60,000 lbs. and more liberal stop-off privileges are provided by the truckers. The boat lines apply the same rate on a 20,000 lbs. minimum as they do on a 60,000 and 80,000 lbs. minimum. As a consequence, smaller shipments can be made by boat to Atlantic Seaboard points without penalty.

SAN FRANCISCO

Mr. James H. McCabe, Vice President in charge of western operations for the Statler Hotels chain, was in San Francisco in mid-March and announced that his firm is definitely considering the erection of new hotels in San Francisco, Portland and Seattle. Sites have not been determined as yet and no doubt it will be some time before they take final action.

YAKIMA

Carload traffic moving into the Hanford Project totaled 1348 carloads for the month divided 960 UP, 124 NP and 264 CMStP&P. This compares with movement of 552 carloads into the project in March last year divided 305 UP, 84 NP and 163 CMStP&P. Of the 960 cars we handled this year 878 were coal, 74 competitive miscellaneous commodities and 8 non-competitive miscellaneous traffic. Of the 130 cars handled via the NP 6 were coal and 124 miscellaneous traffic and of the 264 handled by the CMStP&P 202 were coal and 62 were miscellaneous commodities.

A. J. FOLEY

[fol. 57]

ATTACHMENT No. 4 TO AFFIDAVIT

MEMORANDUM

Omaha—December 11, 1953

In connection with the slow movement of lumber, Mr. Lynch instructed Mr. Shumway to confer with Mr. Hicks to set up a slow operation between Ogden and Council Bluffs by which cars now routed UP via Denver and Ellis would be handled to avoid extra operating expense due to circuity of movement. I sat in on the discussions, and the following plan will be submitted by Mr. Shumway to Mr. Lynch upon the latter's return to Omaha:

1. All cars of lumber that are routed via Denver and Ellis will be set out at Ogden.

2. Such cars will be accumulated and made up into one train to be operated the following day on a "Lumber Special" to Green River and set out at that point.

3. Lumber Special No. 2, handling lumber out of Ogden, will set out at Green River and pickup the cars set out the previous day by Lumber Special No. 1 and move to next terminal, either Rawlins or Laramie, and again set out for 24 hours.

4. Cars will be picked up the following day and moved to Cheyenne and set out for another 24 hours.

The above handling up to Cheyenne will accomplish the maximum delay now being incurred when actually moving cars via Denver and Ellis to Council Bluffs. Additional delays can be accomplished by following this same procedure at Sidney, North Platte and Grand Island. The latter would have the effect of making the schedule approximately twice as long as our present manifest schedule from the coast.

Instructions to the Operating Department, if and when the plan is approved, will be to the effect that these set outs apply to shipments of lumber only and when carrying routing on the waybill via Denver and Ellis. Shipments not so routed will be handled in regular trains.

Mr. Shumway's office will maintain records and police this so that diversions can be properly protected.

N.B.M.

General Traffic Dept., Union Pacific Company,
File 80-199-15-Special.

[fol. 58]

ATTACHMENT No. 5 TO AFFIDAVIT

MAILGRAM

Omaha, Dec. 12, 1953

Orig: EH JEM Omaha
AAH CAL BS CoBluffs
AEH CBH TGC GrIsland
ARS JEG DOS JLK NoPlatte
GAC CJC JMK DOS JEH GHS Cheyenne
JLP JJT Laramie
WGJ TBM Rawlins
HGH BF OAD GTW GrRiver
CTA RWH CAV Denver
REE Ogden

Copy: PJL WTB JRM OJW Omaha
ADH AKM Salt Lake

Effective date, REE, Ogden, will arrange to switch out and concentrate at Ogden, all lumber billed Co. Bluffs routed via Ellis and operate solid trains as instructed by Chief Dispatcher at Gr. River. These lumber specials will be numbered consecutively and are to be set out at Gr. River for duration of approximately 24 hours, then be picked up, and handled in like manner at each succeeding terminal Gr. River to Co. Bluffs. After lumber special No. 1 arrives Gr. River, lumber special No. 2 will be operated out of Ogden and trains rotated so they will move in their consecutive order and not be run around. Agents will disregard the Ellis routing and trains will be handled direct

route for operating convenience Laramie to Co. Bluffs and diversions accomplished enroute by instructions from this office. Diversions will be made at first terminal after received at which point such cars must be switched out and placed in perishable or regular manifest trains for through movement to destination or connecting lines.

REE and Superintendents acknowledge by wire.

S-44

HES—1155 A
HS

[fol. 59]

ATTACHMENT No. 6 TO AFFIDAVIT

Shippers say can definitely depend on SP—DRG—CRI&P taking minimum 17 days Oregon to K City.—

JEA—WOK—DS feel new lbr. spe. service will not afford any slower service than now getting via Ellis—

D&RG—RI—take 12 to 14 days Ogden to K C—

General Traffic Dept., Union Pacific Railroad,
File 80-199-15-Special.

[fol. 60]

ATTACHMENT No. 7 TO AFFIDAVIT

Tell HES to make it 12 days.
Ogden—Co. B. Done 1/6/54

Tell CWE—Done 1/6/54

General Traffic Dept., Union Pacific Railroad,
File 80-199-15-Special.

[fol. 61]

ATTACHMENT No. 8 TO AFFIDAVIT

UNION PACIFIC RAILROAD COMPANY

SAVE TELEGRAPHING MAILGRAM SAVE TELEGRAPHING

COPY

Omaha, January 6, 1954.

PERSONAL

Mr. E. Hicks—Omaha
Mr. J. E. Mulick—Omaha
Mr. C. J. Colombo—Cheyenne

cy—Mr. G. A. Cunningham—Cheyenne

My S-44 and 62 re handling lumber shipments routed via Ellis.

It is necessary that Traffic representatives have a definite established basis to solicit this traffic and request that we use twelve days Ogden to Council Bluffs or Kansas City. This has been approved and they will advise shippers and brokers that lumber shipments routed via Ellis will consume twelve days and it is left up to the Operating Department as to where and how long trains will be held at terminals, but in no case should they cover the territory in less than this schedule.

Please handle confidentially.

S-99

H. E. SHUMWAY

UP GS TRANS 410-SMX

[fol. 62]

ATTACHMENT No. 9 TO AFFIDAVIT

ERM

Re—attached

CWE and JEA have discussed this new D&RG—MP service which is much slower than D&RG—RI. Evers asked Ward to phone and see if we could add two days to our schedule.

NBM 2/11

Discussed W & B 2/15/54

Told HES make it 14 days

Phd CWE

J. R. M.
Feb. 15, 1954

General Traffic Dept., Union Pacific Railroad,
File 80-199-15-Special

[fol. 63]

ATTACHMENT No. 10 TO AFFIDAVIT

COPY

Omaha, January 25, 1954.
File B-95-600-20.

Mr. W. T. Burns:

As information in connection with slow service on lumber, D&RGW-Missouri Pacific are now soliciting roller traffic for diversion enroute to be billed to Topeka via Winfield, Kansas, and are promising 16 to 18 days service.

J. R. MACANALLY

[fol. 64]

ATTACHMENT No. 11 TO AFFIDAVIT

Union Pacific Railroad Company

MAILGRAM

COPY: G McL C
11 Dec 56

Omaha—February 15, 1954

PERSONAL

Mr. E. Hicks—Omaha Mr. G. A. Cunningham—Cheyenne
Mr. J. E. Mulick—Omaha Mr. C. J. Colombo—Cheyenne

My S-44-62 and 99 re handling lumber shipments routed via Ellis.

To compete with competitive lines and to satisfy shippers and brokers, arrange to consume 14 days from departure Ogden to arrival Council Bluffs.

Please handle confidentially. S-325

COPY /s/ H. E. Shumway

General Traffic Dept., Union Pacific Railroad,
File 80-199-15-Special.

[fol. 65]

ATTACHMENT No. 12 TO AFFIDAVIT

COPY

Omaha, July 9, 1954

PERSONAL

Mr. E. Hicks:

cy—Mr. E. H. Bailey, Omaha
Mr. J. R. MacAnally, Omaha

In connection with our conversation day before yesterday, also discussion with General Manager Bailey yesterday, pertaining to tight operative conditions being ex-

perienced due to steadily increasing movement of lumber routed via Ellis.

In addition to the complications being experienced by the Operating Department, I mention the unfavorable per diem situation. For example, yesterday July 8th there were en route 19 lumber trains on the Eastern District, total of 1716 cars of which 1600 were foreign line.

Based on per diem pay-out of $2.40 per car this amounts to $3,840.00 per day, and based on 14 day schedule requested by Traffic Department Ogden to Council Bluffs the per diem amounts to approximately $53,760.00, there being a slight reduction due to a few cars being diverted and expedited from intermediate terminals. This compares with $26,880.00 when this traffic was moving on previous seven day schedule. For a thirty day period this certainly reflects adversely on Car Hire statement.

You, of course, are familiar for the basis of request for this handling and very little information pertaining to the operation has been released in writing both by the Traffic and this department. However, we are faced with situation wherein the shippers are familiar with the operation which has been passed to them by Traffic representatives by word of mouth. At the same time, it is questionable as to how well it is advertised based on the fact that General Superintendent of Transportation Mahoney, of Santa Fe, just called me day before yesterday, shortly after I had discussed the matter with you, and advised that a representative of a large lumber industry on West Coast had called him on the phone advising him of the handling of this lumber on several other routes including Union Pacific and that unless the Santa Fe could likewise handle this traffic they were being cut out of the routing. Mr. Mahoney stated he advised this representative that he could not believe other lines were so handling equipment, especially during the present car situation, and that he would certainly be afraid of ICC taking similar action as previously in the matter. As stated I advised him the lumber was routed via Ellis which, of course, was a slow operation.

[fol. 66] While the movement has been exceptionally heavy past 30 days some of which is due to the threatened lumbermen's strike and with no apparent slow up in move-

ment after the strike and based on present indications of step-up in construction all over the country, the movement is going to continue to be heavy, appreciate difficult operating conditions having so many trains on the Eastern District, coupled with the fact we have a back-up at Council Bluffs which more or less regulates the movement. However, from a competitive standpoint appears we have no alternative but to handle as outlined and stand the enormous per diem expense.

H. E. SHUMWAY

[fol. 67]

ATTACHMENT No. 13 TO AFFIDAVIT

Washington—October 13, 1954

File: B-236-Wiegand
B-236-Johnson & Wimsatt

Mr. J. R. MacAnally—Omaha
cc—Mr. H. L. Lauby—New York

Your Circular 198, September 15, File B-95-600-20-, regarding solicitation of lumber:

This office has received complaints regarding transit time on cars purchased in transit compared with transit time on direct consignments from the Martin Wiegand Lumber Company and the Johnson & Wimsatt Lumber Company, the two largest lumber receivers in this territory, who favor our line with all possible business.

As examples, the Martin Wiegand Lumber Company has directed our attention to Car IC-10083 from Timberlane Lumber Company, Riddle, Oregon, to Council Bluffs for diversion. This car was diverted at North Platte on September 29 but did not depart Council Bluffs until October 9. The latest record on our IBM reports is departure from North Platte on September 30. They also call our attention to Car SLSF-146020, shipped by Timberlane at Riddle, Oregon, which was purchased on September 29. This car did not leave Council Bluffs until October 8. Another example is Car ERIE 78858 shipped from Flynn,

Oregon, September 3, diverted at North Platte on September 19 and departed Council Bluffs on September 23.

When Martin Wiegand complained to the shipper, the Timberlane Lumber Company advised that this matter had been handled with our line and that our office advised that steps were being taken to divert cars at the earliest possible point.

Both Johnson & Wimsatt and Martin Wiegand advise their customers have registered very serious complaints to them about service on transit cars. One of their selling points for transit lumber is that car is already in transit and more prompt receipt is expected. Since this has not been the case, it has resulted in a great deal of embarrassment to all concerned.

Will you please advise what reply we may make to these firms.

J. R. Henderson

General Traffic Dept., Union Pacific Railroad,
File 80-199-15-Special.

[fol. 68]

ATTACHMENT NO. 14 TO AFFIDAVIT

Omaha, Oct. 22, 1954

Mr. J. R. MacAnally:

Your letter of Oct. 21st, file S-80-199-15-spl. sec.

The shipments mentioned were all moving in lumber specials and while we endeavor to get diversions switched out promptly it is not always possible as there are times when it is necessary to hold these trains out at points where switching service not available.

These delays are called to the attention of the Operating people and they are cooperating in reducing delays to minimum.

H. E. SHUMWAY

General Traffic Dept., Union Pacific Railroad,
File 80-199-15-Special.

[fol. 69]

ATTACHMENT No. 15 TO AFFIDAVIT

Union Pacific Railroad Company

MAILGRAM

Portland—May 7, 1955

Mr. H. E. Shumway—Omaha
Mr. H. M. Turner—Portland
Mr. A. McAllister—Portland
Mr. D. F. Wengert—Portland

As a matter of information, ICC Inspector Higgins of Salt Lake has been checking on delay enroute on "Ellis Lumber cars" billed to move via Ogden and/or Ellis. He has been checking on these at Pocatello and has talked to Terminal Supt. and others there with the idea that this is "SMX" service and is causing too much delays to box cars and causing a lot of the shortages.

Have also noted that he has been in several shipping points—namely Meridian, Emmett and Caldwell, and undoubtedly at Burns and other lumber shipping points. From information received in conversations with the agents, it is apparent he is gathering quite a lot of information with the view of stopping this type of service. He has been asking the agents why the cars are billed to move via this routing, and why they are not always moved via Ogden and Ellis when so billed.

F-122

F. F. Bailius

General Traffic Dept., Union Pacific Railroad,
File 80-199-15-Special.

[fol. 70]

ATTACHMENT No. 16 TO AFFIDAVIT

Portland, Oregon, May 30, 1955.

File: A-

Mr. W. T. Burns—Omaha.

Referring to Mr. Batchelder's letter to you of May 26th concerning the freight car situation in this area:

It is true that a shortage has developed on the Southern Pacific lines in Oregon and in recognition of that fact the SP has placed an order requiring all divisions on its lines to move box cars to its Oregon area that are in excess of 80% of their needs. Additionally, the Oregon Public Utilities Commissioner has readied an emergency order, similar to the one in 1950, to enforce equitable distribution of whatever cars are available, but is holding it back until later on this week in order to determine the effects of the SP order above mentioned.

In requesting the Western carriers to discontinue the practice of circuitous routing on their own lines, and to slow-down or slow movement of the cars, Mr. Batchelder states "Our industry urges the elimination of these wasteful practices." Obviously he does not speak for the entire lumber industry, but instead only those mills that are members of the West Coast Lumbermen's Association, and in that respect I doubt if he is speaking for all of them because some do engage in the transit business. Regardless, however, there is no doubt but that the practices described do contribute to the car shortage.

C. W. EVERS

General Traffic Dept., Union Pacific Railroad,
File 80-199-15-Special.

[fol. 71]

ATTACHMENT No. 17 TO AFFIDAVIT

COPY

Salina—May 8, 1956
File 100-R

Mr. J. R. MacAnally—Omaha:

(cc—Mr. D. R. Alexander, Kansas City)

On form 922, Junction Passing Report, of May 6, I noticed the following routing on a carload of lumber from Dallas, Ore. April 15:

Date:	April 15
Car Number:	SP 15068
Waybill No.	SP 50471
Waybill Sta.	Dallas, Oregon
Waybilled To.	Medford, Massachusetts
Received at	Ogden
Commodity	Lumber
Weight	98640
Rate	1.15
Route:	SP Ogden UP Salina MP Wichita AT&SF Sweetwater, T&P SSW IT IC C&O Detroit PRR New York NYC B&M.
Shipper:	Twin Harbors Lumber Co.
Consignee:	Twin Harbors Lumber Co.

Collectively, these roads are conducting quite a warehousing operation.

T. F. Meyer

Union Pacific Freight Traffic Dept.
File 52-243-910.

[fol. 72]

ATTACHMENT No. 18 TO AFFIDAVIT

Omaha—July 23, 1956

File: B-52-243-910

Mr. W. T. Burns:

Referring to attached letter proposed for transmittal to Commissioner Clarke about Service Order No. 910:

While letter as written suggests we will publish routing via Northport, Nebraska or Colby, Kansas, KGC suggests it would be less subject to suspension if we published via Salina to Council Bluffs and via Fremont and Valley to Kansas City as such publication would simply be formalizing by tariff publication routing we have heretofre permitted under the "parallel route" theory. On the other hand, it is my view that routing via Salina to Council Bluffs would add only two or three days to the schedule at the most; while routing via Fremont and Valley to Kansas City would probably only add one day to the schedule. Of course, publishing Northport or Colby would doubtless be characterized as a deliberate attempt to slow down the movement, but such routing would seem to be necessary to meet CRI&P competition via Abilene where we have advice they are soliciting traffic on the basis of 7 to 9 days service from Denver to Kansas City.

Also, whatever routing is published will necessitate actually handling shipments via such routing; rather than in slow-down main-line service such as adopted on the Ellis routing arrangement in order to conserve in train miles.

CWE advises SP reports for period June 13th to July 7th show 600 cars interchanged to SP&S at Portland routed SP&S-WP, etc. as against none a year ago.

Stubbs, C&NW, advises they are contemplating lodging some protest with ICC, as they estimate their losses at 2000 cars per month and $4,200,000 in revenue on an annual basis. He had talked with Draver to see what CMStP&P were contemplating; but up to now they are just sitting by.

After considering all the angles, I think we definitely should send the letter to Clarke in view of the inference

during PJL's discussion June 8th that they expected to hear further from us. I think too we should allow about ten days for some reply from Clarke before actually issuing tariff supplements, this in order to show good faith in writing him in the first place and to also see if the letter provokes any change in Taylor's interpretation or amendment to the Service Order restricting the use of unduly circuitous routes. Feel this is preferable in view of divided feeling among shippers and receivers about the desirability of Service Order No. 910 as it will avoid "beating the drum" if we can get some protection for our traffic without it.

J. R. MacAnally

From File 52-243-910, Union Pacific Freight Traffic Dept.

[fol. 73]

ATTACHMENT No. 19 TO AFFIDAVIT

INTERSTATE COMMERCE COMMISSION
WASHINGTON, 25

July 30, 1956

Mr. W. T. Burns
Vice President-Traffic
Union Pacific Railroad Co.
Omaha 2, Nebraska

Dear Mr. Burns:

This will acknowledge receipt of your letter of July 24, file A-52-243-910, regarding ICC Service Order No. 910 and the effect it has had on lumber shipments routed via the Union Pacific Railroad.

Service Order No. 910 was intended to eliminate the use of freight cars as storage during the present box car shortage. Among the practices prevalent prior to the issuance of Service Order No. 910 was the slow schedule afforded certain lumber shippers whereby they were allowed thirty days' free storage en route between originating points in the Northwest and the Missouri River crossings. This traffic-solicitation inducement was offered and provided with-

out tariff authority and without demurrage or storage charges being assessed.

A check at Council Bluffs covering 1,400 cars during the period September 26, 1955 to February 20, 1956 showed that 1,014 cars were en route from origin to Council Bluffs an average of 29.2 days per car; whereas the average time in transit should not have been over 8 days per car. A check of 288 cars at Omaha billed prior to June 13, 1956, consumed an average of 18.3 days from origin to arrival at Council Bluffs. Ninety-five cars checked at Council Bluffs on June 29, which had been billed June 13, and thereafter, consumed an average of 8.32 days en route. This would indicate that Service Order No. 910 has had the effect of eliminating the unauthorized so-called 30-day schedule.

You state that since enforcement was undertaken on June 13, you estimate that you have lost a minimum of 1,542 cars and have been short-hauled on 69 others, and that this is traffic that you would normally handle.

Service Order No. 910 does not prohibit railroads from accepting shipments which are routed under present applicable tariff routes; and if Service Order No. 910 creates [fol. 74] a discriminatory condition against the Union Pacific Railroad, which you allege, it is due to the apparent practice of your railroad and others of allowing certain shippers concessions in the matter of storage in transit not accorded all shippers.

The Commission is having field checks made to see that Service Order 910 is complied with and that lumber shipments are being handled strictly in accordance with tariff routings and charges, and any violations of the Order or failure to assess proper charges will be handled for prosecution.

Sincerely yours,

Owen Clarke
Commissioner

CWTaylorVem

[fol. 75]

ATTACHMENT No. 20 TO AFFIDAVIT

Omaha, July 27, 1956.

File B-52-243-910.

Mr. D. R. Walker—Winston-Salem

Your letter of July 16th, file A-62, about I.C.C. Service Order No. 910:

It is correct that the I.C.C., by interpretation dated July 2nd, have agreed that CRI & P may route shipments via Abilene, Kansas to Kansas City, etc., for diversion, because CRI&P provide in their tariffs for routing via Abilene, Kansas.

Our difficulty is that we do not specify in tariffs any interior routing on the Union Pacific, and until this has been corrected or until the service order is modified, we can only solicit for routing via authorized tariff routes and with the understanding that we must use our normal fast freight routes for the transportation service between origin, or junction point, and point of delivery to connection.

This entire matter is having attention direct with the I.C.C., but until such time as you receive further advice we have no alternative but to comply completely with Service Order No. 910.

J. R. MACANALLY

From File 52-243-910, Union Pacific Freight Traffic Dept.

[fol. 76]

ATTACHMENT No. 21 TO AFFIDAVIT

MAILGRAM

Omaha, August 24, 1956.

File A-52-243-910.

Mr. E. Hicks:

Your mailgram A-167, file 522-3, August 13th about Service Order No. 910:

We are soliciting eastbound lumber traffic for routing via Union Pacific via Colby, Kansas, on the basis, from Ogden to Council Bluffs, the service will range from six to eight days.

A-14.

W. T. Burns

From File 52-243-910, Union Pacific Freight Traffic Dept.

[fol. 77]

ATTACHMENT No. 22 TO AFFIDAVIT

B-52-243-910

Omn—Dec. 7 1956

(Freight—28)

TELEGRAM

(HLL—NY	(DRW—Win-Salem	(JCS—Medford	(JAG—Oakland
(LGS—NY			(HGP—Fresno
	(LLC—St Joe	(Echele—Denver	(FAF—Sacto
(HYC—Chgo	(FSB—Salina	(ABT—Denver	(HGL—SDiego
(JMA—Chgo	(RAW—Topeka		(WMC—Reno
(TLV—Chgo	(CWE—Port	(SR—SLake	(CB—Stockton
(WVL—Chgo	(TJD—Port	(RFP—SLake	(WAS—Glendale
(WWC—Toronto	(DS—Port		(HJD—LBeach
(GAB—Cleveland	(CWR—Bend	(DRA—KC	(LAW—Pasadena
(PSS—Atlanta	(JEA—Eugene	(AHG—KC	(JLB—Riverside
(JDG—B'ham	(JML—W Walla	(JWP—LA	(JVC—SPedro
(GER—Memphis	(RAH—Yakima	(FLM—LA	(EGH—Santa Ana
(DVR—N Olns	(CHJ—Aberdeen	(JDM—LA	(LML—Las Vegas
(EWM—Cinti	(HJB—Lewiston		(Wac—SMonica
(CJS—Detroit	(JRL—Spokane	(MHF—SFran	(HCD—San Jose
(FOK—Detroit	(FGR—Tacoma	(FCB—SFran	(CEA—Chian
(RTP—Milwaukee	(PAA—Seattle		(FHG—Chian

(FMP—Gering		CAR—Mpls	RAF—Omaha
	HFB—Pitts	TWG—StLouis	JFT—Lincoln
(KLJ—Boise	MWC—Boston	WWM—DMoines	JFB—Ogden
(RAA—Poca	WDH—Phila	LJR—SiouxCy	MAA—Dallas
(JDF—Butte	JRH—Wash	JCB—Oma (3)	LBB—Tulsa

Service Order 910 being vacated midnight tonight. We are not reinstating routing via Ellis but instead will continue routing via Colby with understanding such traffic in future will move via main line in special service on 14-day schedule Ogden to Council Bluffs. B-9

J R M
415 P

From File 52-243-910, Union Pacific Freight Traffic Dept.

[fol. 78]

ATTACHMENT NO. 23 TO AFFIDAVIT

Portland, January 3, 1957

File G-5890-6200-7-C

Mr. P. A. Aulenbacher—Seattle
Mr. F. G. Rothwell—Tacoma
Mr. S. A. Fredeen—Aberdeen
Mr. Don Sutherland—Portland
Mr. J. R. Livsey—Spokane
Mr. H. J. Berger—Lewiston
Mr. J. M. Landau—Walla Walla
Mr. R. A. Howland—Yakima
Mr. C. W. Rexroad—Bend
Mr. J. E. Atherton—Eugene
Mr. R. D. Toomey—Medford
Mr. L. E. Donahue—Pendleton
Mr. L. E. Tompkins—Longview
Mr. L. J. Ziesmer—Portland

cc-Mr. J. R. MacAnally—Omaha

Referring to existing arrangements for handling movement of eastbound shipments of transit lumber:

You are requested to review Mr. J. R. MacAnally's telegram of December 7th, symbol E-9, which advises that routing via Ellis, Kansas was not being reinstated, with the termination of Service Order No. 910 at midnight on December 7th, but instead we would continue routing via Colby, Kansas.

There have been several instances called to our attention where shipments have been billed via Ellis, Kansas since December 7th. You will appreciate that a large number of Operating Department employees handle waybills covering these individual transit car shipments and that unless we observe a completely uniform basis in the billing of such shipments there is too much chance of confusion which would lead to mishandling and resultant complaints from our patrons.

You are, therefore, requested to immediately take such action as may be necessary to insure that each and every one of the transit lumber shippers, who are located at points within your respective territories, have a complete understanding that they should use routing via "Colby, Kansas", without exception.

Please so arrange.

C. W. Evers

From File 52-243-910, Union Pacific Freight Traffic Dept.

[fol. 79]

ATTACHMENT NO. 24 TO AFFIDAVIT

COPY

Omaha, May 24, 1957.

Mr. J. R. MacAnally—Omaha

cy—Mr. C. W. Evers—Portland
Mr. H. L. Crawford—Portland
Mr. M. H. Fowler—San Francisco
Mr. C. H. Burnett—Omaha

Referring to the discussion at the meeting of traffic representatives at Omaha recently, wherein it was requested that "roller" lumber should be handled on a more consistent schedule, and particularly with reference to the difficulty in accomplishing diversions after received from shippers, and getting such shipments switched out and moving on fast schedule.

The plan which was outlined as feasible, i.e., establishing thirteen day schedule Ogden to North Platte to be maintained consistently, at which point remove all restrictions, permitting expedient handling from North Platte to Council Bluffs and Kansas City, as operating conditions permit, has been arranged and will be placed into effect immediately.

These trains will be humped at North Platte where it will be possible to accomplish diversions while separating the

east from the south traffic, and Mr. Burnett has been advised that if they should lose an additional day in the humping operation or in moving them through North Platte, there will be no criticism, inasmuch as it was definitely stated that these shipments could be delayed one or two days beyond the fourteen day schedule and, in most cases, would be more satisfactory to the shippers.

It should be pointed out, however, that after these shipments once leave North Platte in fast trains, the next point of diversion will be Council Bluffs and Kansas City, unless, of course, they should be diverted for short points.

H. E. SHUMWAY

Mr. C. H. Burnett:

Assume you will issue necessary instructions to so handle on Eastern District. North Platte should also understand that there is no objection to delaying these trains an additional day in handling at that point.

UP GS TRANS 410-SMX

Attachment No. 2

Member Specials

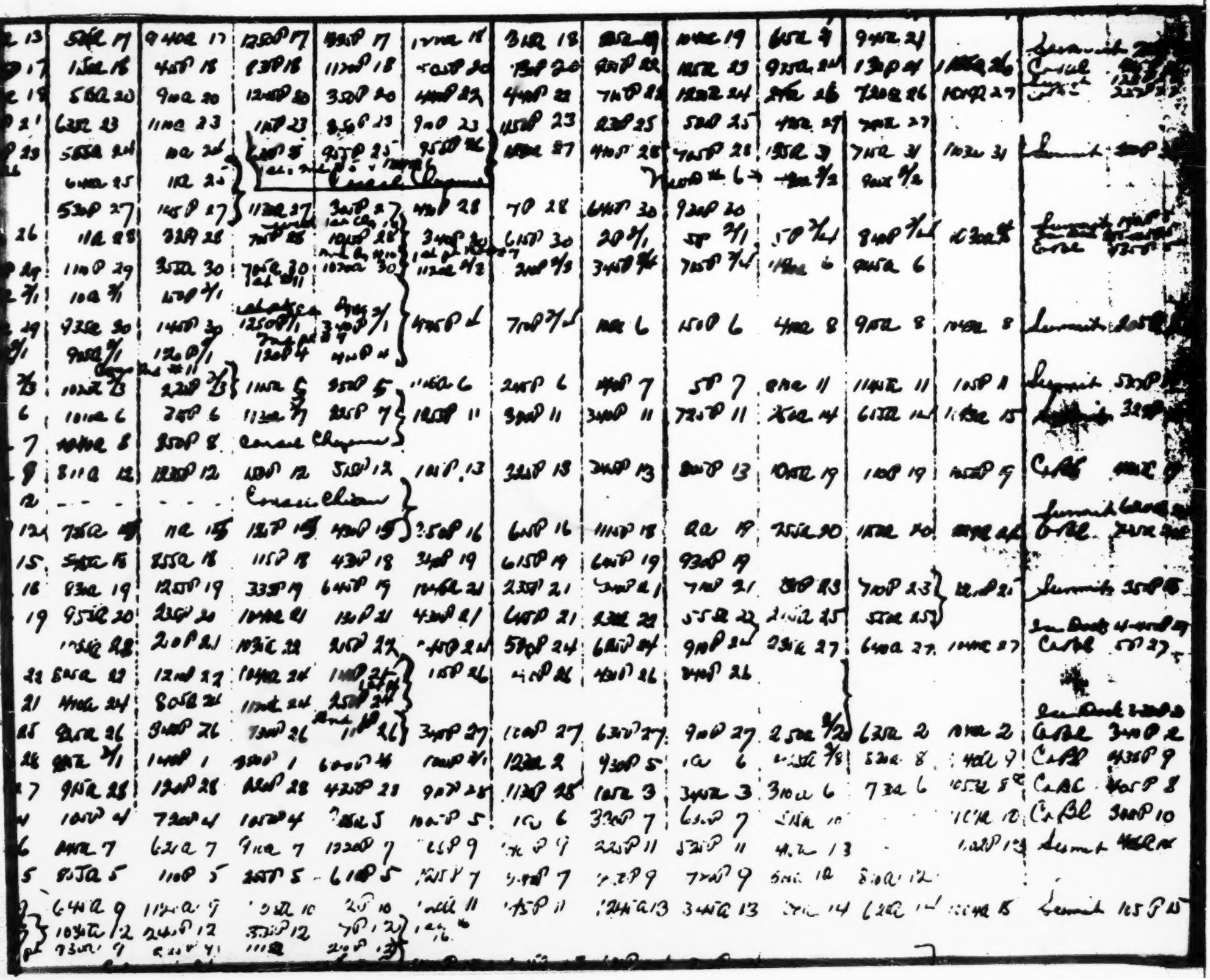
1956

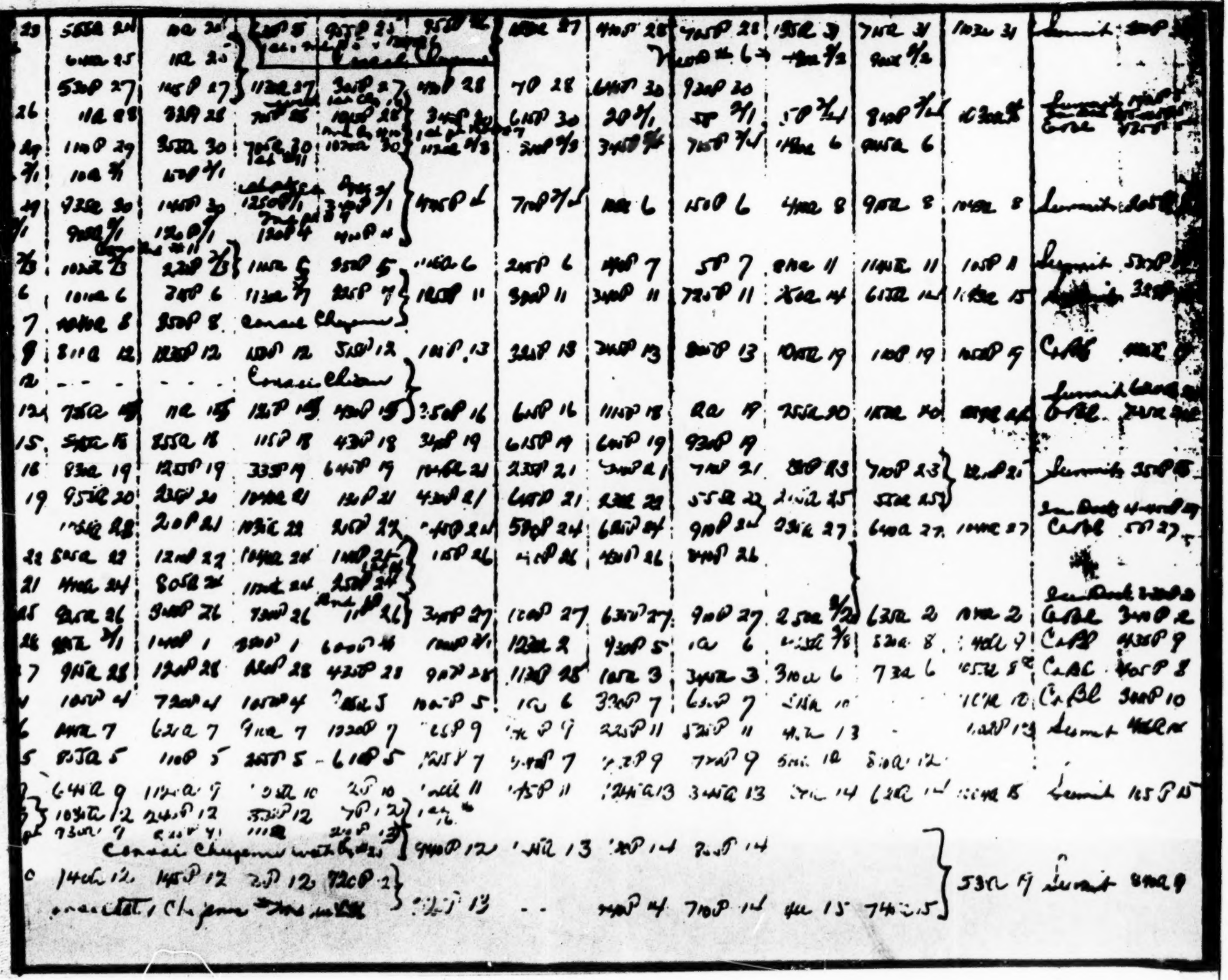
Team Numbers	Ogden	Ar	Kw	Ar	Kw	Kw	Kw	Kw	Ar
		Green River		Rawlins		Kaysville		Cheyenne	Lodi
Rw #1			1132 17	1110 11	902 12	1205 12	1105 17	1500 17	1100 20	1250 20
Rw #2			3252 17	1000 14	1102 14	1350 14	1250 17	2350 17		
Rw #3			1132 17	7100 16	5252 17	1052 17	(Cancelled	cancelled	Rw #4)	
Cg #1	5350		1202 20	5502 20			1250 17	3150 23	(Cancelled	cancelled
Cg #2	1200	1402	1250 24	5502 22	1252 24	7100 24	1105 24	3502 24	1220 24	3000 24
Rw #4			2450 16		1302 17	6100 21	1100 23	1150 23	3302 24	5302 24
Rw #5	8150	1000 19	1000 21		1052 26	250 26	1142 28	2450 28	1100 28	7000 28
Cg #3	1100			4502 24	1202 25	1250 25	1120 27	2400 27	1052 27	1150 27
Cg #4	5000	700 24	830 26	1302 26	5302 27	1102 27			1102 31	1000 31
Rw #6		1002 26	1130 24	4502 25	750 27	4302 27	1002 28	1100 28	1150 29	5000 29
Cg #5	1120	302 26	1150 27	702 27	4102 28	800 28				1752
Rw #7		2052 25		850 26	8352 30	2100 30	1102 31 (2nd Rd)	200 1 (2nd Cancel)	1102 1	
Cg #6	6400	110 26	1000 27	4502 28	1052 28	4350 28	1002 31	1200 31	1100 1	4250 41
Rw #8		900 26	6402 29	110 29	5352 1	5252 1	1152 1	300 1	1050 2	1150 2
Cg #7	0	4350 28	300 30	8052 30	5350 1	950 1		2400 3	1102 3	1200 3
Cg #8	52	3600 30		2252 1	5302 3	1010 3	1102 3	2200 3	110 5	1650 5
Cg #9	1350	1000 2	1000 3	5202 3	1002 4	200 4	1200 5	3200 5	102 7	1100 7
Rw #1	1200	2002 2	1402 4	802 4	500 7	900 7	1002 8	1250 8	1550 9	4 50 9
Cg #1	2302	6402 4			1602 9	1500 8	400 8	6402 8	4100 10	6450 10
Cg #2	1000	5100 5	1000 5	2450 8	4302 8	8450 8		2400 23		
Rw #2	250	1000 4	2452 8	6402 8	5302 12	1002 12	1200 12	4100 12	9200 12	1202 12
Cg #3	1250	4100 7	1450 10	6302 11	7002 12	1502 12	200 13	5100 13	4100 14	7000 14
Rw #3	1150	6450 8	1150 11	3402 12	1402 13	7100 13	1400 14	3200 14	2400 16	5200 16
Rw #4	4302	9200 17	1652 21	7100 21	6450 21	1202 22	3450 22	6300 22	4100 25	7200 25

Attachment No. 25

(Number Repeated)

Ar Ke Aurora		Lv Ke Kearney		Ar Ke Cheyenne		Lv Ke Sidney		Ar Ke North Platte		Ar Ke Gibbon	Lv Ke Lobeck	Ar Ne Lincoln	
11	9 A 12	12 A 12	1 A 17	1 P 17	11 A 20	12 P 20	1 P 20	4 P 20			12 A 24	Cable	9 A 27
16	5 P 17	10 A 17	(Canceled		Ke #4 at Cheyenne)								
20			12 P 23	3 P 23	(Canceled		Ke #4 at Cheyenne)						
22	11 A 24	7 P 24	11 A 24	3 A 25	12 P 26	3 P 26	3 P 26	5 P 26	1 A 26	6 A 28	9 A 30	Cable	1 P 30
	12 A 24	6 P 24	11 A 25	1 P 25	3 A 24	5 A 24	5 A 24	8 A 24	4 A 26	6 A 26	12 P 28	Cable	5 P 28
	10 A 26	2 P 26	11 A 28	2 P 28	7 P 28	3 P 29	5 P 29	2nd pl.					
24	12 A 25	12 P 25	11 A 26	2 P 27	10 A 27	1 P 27	1 P 27	4 P 27				Cable	8 A 1
26	5 A 27	11 A 27			11 A 31	3 P 31	8 P 31	4 A 1				Cable	4 P 4
25	7 A 27	4 P 27	10 A 28	11 P 28	1 P 29	5 P 29	6 A 31	9 A 31			3 A 30	Cable	8 A 3
27	11 A 28	8 A 28				1 A 4	12 A 4	3 A 4					
6	8 A 30	2 P 30	1 A 1	2 P 1	(Canceled			8 at Cheyenne)					
6	10 A 28	4 P 28	10 A 31	12 P 31	1 A 1	4 P 1							
29	9 A 1	5 A 1	11 A 1	3 P 1	10 P 2	11 P 2	12 P 3	3 A 3					
30	5 P 1	9 P 1		2 P 3	11 A 3	12 P 3							
1	5 A 3	10 A 3	11 A 3	2 P 3	11 A 5	1 P 5					11 A 11		
3	10 A 4	2 P 4	12 P 5	3 P 5	11 A 7	1 P 7	6 P 9	8 P 9	2 A 11	6 A 11	11 A 15		
4	8 P 7	9 P 7	10 A 8	12 P 8	1 P 9	4 P 9	9 P 10	12 A 11	1 A 13	6 A 13	11 A 17	1) Cable	
	1 A 8	1 P 8	4 P 8	6 P 8	4 P 10	6 P 10	1 A 12	10 A 12	5 A 17	9 A 17			
	4 P 8	8 P 8											
	8 A 12	1 A 12	2 P 12	4 P 12	9 P 12	12 A 12	1 P 14	4 P 14	5 A 15	10 A 15	10 P 16		
1	7 A 12	1 P 12	2 P 13	5 P 13	11 P 14	4 P 14	6 P 16	9 P 16	3 P 19	6 P 19	2 A 21		
2	1 P 13	7 P 13	1 P 14	3 P 14	2 P 14	5 P 16	8 P 17	7 P 17	8 A 18	12 P 18	4 P 19		
1	8 P 21	12 A 22	3 P 22	6 P 22	4 P 25	7 P 25	1 A 27	5 A 27	7 A 29	2 P 29	11 P 29		
3	5 A 17	9 A 17	12 P 17	3 P 17	1 A 18	3 A 18	8 A 19	10 A 19	6 A 9	9 A 21			



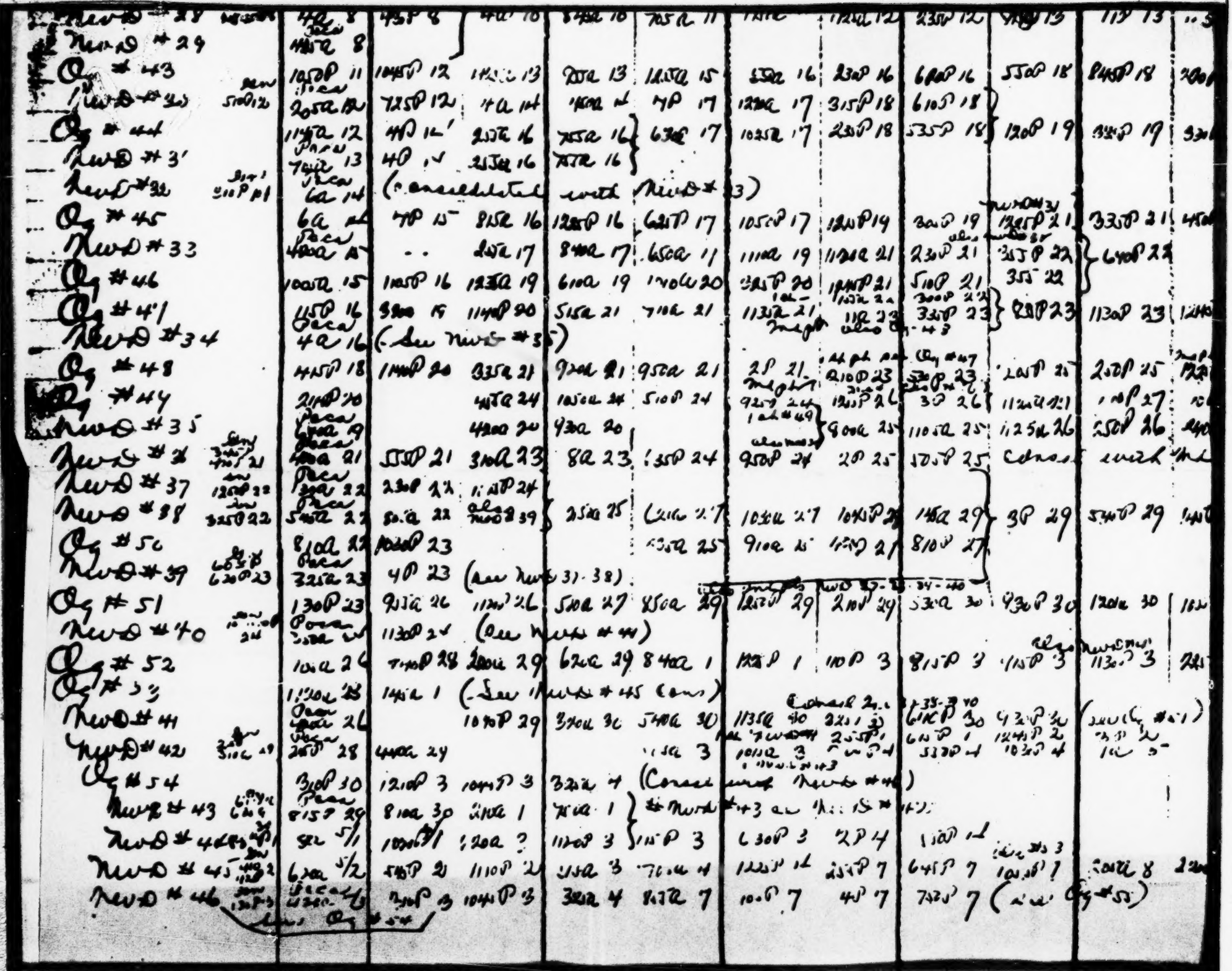


1937 December Aforeale

Train Number	Ar	Lv	Ar	Lv	Ar	Lv	Ar	Lv	Ar	Lv	Ar	Lv	Ar
	Ogden		Green River		Rawlins		Laramie		Cheyenne		Sidney		
Eg #26													
Eg #17													
Eg #27													
Eg #28													
Eg #29													
Eg #19													
Eg #30													
Eg #31													
Eg #32													
Eg #33													
Eg #34													
Eg #20													
Eg #35													
Eg #21													
Eg #36													
Eg #37													
Eg #38													
Eg #23													
Eg #24													
Eg #25													
Eg #39													
Eg #26													
Eg #40													
Eg #41													

December Arrivals

Ar	Dep	Ar	Dep	Ar	Dep	Ar	Dep	Ar	Dep	Ar	Dep	Remarks
		Laramie		Cheyenne		Sidney		North Platte		Grand Island		
12	12											
12	16											
14	14											
18	18											
20	20											
22	22											
25	25											
26	26											
28	28											
30	30											
27	27											
1	1											
31	31											
3	3											
	8											
3	3											
5	5											
8	9											
	10											
	13											



1957 May

Classic Kentucky Kennels

Member	Kennel Name	Lic. Ky. Kennel	Lic. Ky. Kennel	Lic. Ky. Kennel	Lic. Ky. Kennel	Lic. Ky. Kennel	Lic. Ky. Kennel	Lic. Ky. Kennel
Clay #55								
Newell #47								
Clay #56								
Newell #48								
Newell #49								
Clay #57								
Newell #50								
Clay #58								
Newell #51								
Clay #59								
Newell #52								
Newell #53								
Clay #60								
Newell #54								
Clay #61								
Newell #55								
Clay #62								
Clay #63								
Newell #56								
Clay #64								
Clay #65								
Clay #66								
Newell #57								

Cincinnati Reversals

Ar Kel Marietta	Ar Kel Wheeling	Ar Kel Charleston	Ar Kel Sidney	Ar Kel Ashland	Ar Kel Huntington	Ar Kel Gallipolis	Ar Kel Portsmouth
1030a 7	320p 7	1130a 8	9am 8	11:30p 9	4:50p 9	4:50p 10	6:40p 10
5:40a 9	9:00a 9	4:30p 9	4:30p 10			4:40p 13	7:40p 13
9:00a 9	1:35p 9	1:40p 10	5:30p 10	1:40p 13			
10:30p 9	5:30p 12	5:30p 12	1:N 1:3		4:30p 14	3:30p 14	6:30p 14
		10:30p 12	3:30p 14		6:30p 14	4:30p 15	7:30p 15
		1:30a 13	8:30p 13		4:00 15		
10:30a 13	3:30p 13	6:30p 14	9:30p 14	9:30p 14	5:30p 15	6:30p 16	9:30p 16
10:30a 14	3:30p 14	1:30p 15	5:30p 15	9:30p 14	5:30p 16		
10:30a 15	7:30p 15	11:30p 15	3:30p 15	9:30p 16	10:30p 16	(same thru 5-4)	
2:00p 16	7:30p 16	11:30p 22	5:30p 23	12:30p 23	4:30p 23	7:30p 23	1:30a 27
9:30a 13	3:30p 13	1:30p 16	4:30p 18	3:30p 19			
3:30a 23	10:30a 23				11:30p 23	4:30p 23	9:30a 24
(same thru 5-4)	(same thru 5-4)						
7:30a 23	11:30a 23	1:30p 25	1:30p 26	11:30a 26	1:30p 26		
9:30a 23	1:30p 23	(same thru 5-4)	9:30a 23	4:30p 23	7:00p 23	2:30 26	5:30p 26
10:30a 27	3:30p 27	10:30p 27	4:30p 27				
11:30a 27	4:30p 27						

[fol. 81]

EXHIBIT C TO MOTION FOR SUMMARY JUDGMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
WESTERN DIVISION

Civil Action No. 1-299

UNITED STATES OF AMERICA

Plaintiff

v.

UNION PACIFIC RAILROAD COMPANY

Defendant

AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

United States of America)
District of Columbia) ss.

Harold D. McCoy, being first duly sworn, deposes and says:

I am Harold D. McCoy, Secretary of the Interstate Commerce Commission, and have personal knowledge of the facts herein set forth.

I am Secretary of the Interstate Commerce Commission and as such have in the District of Columbia the custody of all railroad tariffs filed with the Commission pursuant to law. I also receive and retain in my custody those copies of Service Orders issued by the Commission which are deposited in my office at Washington, District of Columbia, as notice to the public of the Commission's actions. In my capacity as Secretary of the Interstate Commerce Commission, I sign all Service Orders issued at the direction of the Commission.

Attached to this affidavit are certified copies of the following listed orders and notices issued by the Commission which I signed and of which I have custody:

[fol. 82] 1. Service Order No. 910, March 19, 1956

2. Corrected Service Order No. 910, March 19, 1956

3. Notice re Service Order No. 910, June 13, 1956

4. Service Order No. 910-A, December 6, 1956

Service Order No. 910 was of temporary duration, as are all service orders of the Commission.

Also attached to this affidavit are certified extracts of portions of the following designated tariffs currently filed with the Commission of which I have custody and in which defendant, as shown in the extracts, is either an issuing or participating carrier.

Freight Tariff No. 4-D, H. R. Hinsch, Agent, I.C.C. 4808 (Demurrage Tariff)

Title Page and Page 2

Page 8—participating carrier Union Pacific
" 14—Item 20—Application
" 43—Rule 1
" 44—Rules 1 and 2
" 45—Rule 2
" 46—Rule 3
" 47—Rule 3
" 48—Rule 4
" 49—Rule 4
" 50—Rule 7
" 51—Rule 7 and Participating Power of Attorney from Union Pacific

Union Pacific Railroad Tariff No. 4000-A, I.C.C. 5325, Official Distances

Title Page

Page 3 —Item 5
" 4 —Item 20
" 14-15 —Junction Points
" 17 —Application Section A
" 51 —Distance Council Bluffs from Ogden
" 46 —Distance Colby from Ogden
" 43 —Distance Colby from Council Bluffs

Page 61 —Distance Ellis from Ogden
" 49 —Distance Council Bluffs from Ellis

Pages 205) through 209)—and back cover showing system map and related geographical locations of above listed points.

Consolidated Freight Classification No. 21
Western Classification 76
Agent Geo. H. Dumas, I.C.C. 34

Title Page

Page 2
" 8 —Participating carrier Union Pacific
" 120 —Rule 1
" 157)
" 158)—Uniform Straight Bill
" 159) of Lading (Contract terms 2(a))
" 169 —Bill of Lading short form
Copy of Participating Power
of Attorney from Union Pacific.

/s/ Harold D. McCoy
Harold D. McCoy
Secretary
Interstate Commerce Commission

(SEAL)

Subscribed and sworn to before me by Harold D. McCoy, this 16th day of May, 1958.

/s/ Harry R. Deale
Notary Public in and for the
District of Columbia

(SEAL)

My Commission expires July 15, 1962.

[fol. 84]

ATTACHMENT NO. 1 TO AFFIDAVIT

(Page 1 of 2 pages)

TITLE 49—TRANSPORTATION
CHAPTER I—INTERSTATE COMMERCE COMMISSION
SUBCHAPTER A—GENERAL RULES AND REGULATIONS

PART 95—CAR SERVICE

SERVICE ORDER NO. 910

RAILROAD OPERATING REGULATIONS FOR THE MOVEMENT OF LOADED FREIGHT CARS

At a Session of the Interstate Commerce Commission, Division 3, held at its office in Washington, D. C., on the 19th day of March, A. D. 1956.

It appearing, That an acute shortage of freight cars exists in all sections of the country; that the movement of loaded freight cars is being delayed solely for the purpose of gaining additional time; that present rules, regulations, and practices with respect to the use, supply, control, movement, distribution, exchange, interchange, and return of freight cars are insufficient to promote the most efficient utilization of cars; it is the opinion of the Commission that an emergency exists requiring immediate action to promote car service in the interest of the public and the commerce of the people.

It is ordered, That:

§95.910 RAILROAD OPERATING REGULATIONS FOR THE MOVEMENT OF LOADED FREIGHT CARS.

(a) (1) No common carrier by railroad subject to the Interstate Commerce Act shall willfully delay the movement of loaded freight cars by holding such cars in yards, terminals, or sidings for the purpose of increasing the time in transit of such loaded cars.

(2) Loaded cars shall not be set out between terminals except in cases of emergencies or sound operating requirements.

(3) Backhauling loaded cars for the purpose of increasing the time in transit shall constitute willful delay and is prohibited.

(4) Through loaded cars shall not be handled on local or way freight trains for the purpose of increasing the time in transit of such loaded cars.

(5) The use by any common carrier by railroad, for the movement of loaded freight cars over its line, of any route other than its usual and customary fast freight route from point of receipt of the car from consignor or connecting line to point where delivered to consignee or connecting line, except in emergencies, or for the purpose of according a lawfully established transit privilege (not including a diversion or reconsignment privilege), is hereby prohibited.

(b) *Application.* The provisions of this order shall apply to intrastate and interstate commerce.

(c) *Regulations suspended—announcement required.* The operation of all rules and regulations, insofar as they conflict with the provisions of this order, is hereby suspended and each railroad subject to this order, or its agent, shall publish, file, and post a supplement to each of its tariffs affected hereby, in substantial accordance with the provisions of Rule 9(k) of the Commission's Tariff Circular No. 20 (§141.9(k) of this chapter), announcing such suspension.

[fol. 85] (Page 2 of 2 pages)

(d) *Effective date.* This order shall become effective at 12:01 a.m., April 9, 1956.

(e) *Expiration date.* This order shall expire 11:59 p.m., December 31, 1956, unless otherwise modified, changed, suspended, or annulled by order of this Commission.

It is further ordered, That a copy of this order and direction shall be served upon the railroad regulatory body of each State and upon the Association of American Railroads, Car Service Division, as agent of the railroads subscribing to the car service and per diem agreement under the terms of that agreement, and all other carriers by railroad; and that notice of this order be given to the general public by

depositing a copy in the office of the Secretary of the Commission at Washington, D. C., and by filing it with the Director, Division of the Federal Register.

(40 Stat. 101, Chap. 23; 41 Stat. 476, sec. 402; 485; Sec. 418; 54 Stat. 901, Sec. 4; 912, Sec. 10; 49 U.S.C. 1(10)-(17), 15(4)).

By the Commission, Division 3.

HAROLD D. McCOY,
Secretary.

(SEAL)

A true copy.

/s/ Harold D. McCoy
Secretary of the Interstate
Commerce Commission.

[fol. 86]

ATTACHMENT NO. 2 TO AFFIDAVIT

TITLE 49—TRANSPORTATION
CHAPTER I—INTERSTATE COMMERCE COMMISSION
SUBCHAPTER A—GENERAL RULES AND REGULATIONS

PART 95—CAR SERVICE

CORRECTED SERVICE ORDER NO. 910

RAILROAD OPERATING REGULATIONS FOR THE MOVEMENT OF LOADED FREIGHT CARS

At a Session of the Interstate Commerce Commission, Division 3, held at its office in Washington, D. C., on the 19th day of March, A. D. 1956.

It appearing, That an acute shortage of freight cars exists in all sections of the country; that the movement of loaded freight cars is being delayed solely for the purpose of gaining additional time; that present rules, regulations, and practices with respect to the use, supply, control, movement, distribution, exchange, interchange, and return of freight cars are insufficient to promote the most efficient utilization of cars; it is the opinion of the Commission

that an emergency exists requiring immediate action to promote car service in the interest of the public and the commerce of the people. Accordingly, the Commission finds that notice and public procedure are impracticable and contrary to the public interest, and that good cause exists for making this order effective upon less than thirty days' notice.

It is ordered, That:

§95.910 Railroad Operating Regulations for the Movement of Loaded Freight Cars.

(a)(1) No common carrier by railroad subject to the Interstate Commerce Act shall willfully delay the movement of loaded freight cars by holding such cars in yards, terminal, or sidings for the purpose of increasing the time in transit of such loaded cars.

(2) Loaded cars shall not be set out between terminals except in cases of emergencies or sound operating requirements.

(3) Backhauling loaded cars for the purpose of increasing the time in transit shall constitute willful delay and is prohibited.

(4) Through loaded cars shall not be handled on local or way freight trains for the purpose of increasing the time in transit of such loaded cars.

(5) The use by any common carrier by railroad, for the movement of loaded freight cars over its line, of any route other than its usual and customary fast freight route from point of receipt of the car from consignor or connecting line to point where delivered to consignee or connecting line, except in emergencies, or for the purpose of according a lawfully established transit privilege (not including a diversion or reconsignment privilege), is hereby prohibited.

(b) *Application.* The provisions of this order shall apply to intrastate and interstate commerce.

(c) *Regulations suspended—announcement required.* The operation of all rules and regulations, insofar as they conflict with the provisions of this order, is hereby sus-

pended and each railroad subject to this order, or its agent, shall publish, file, and post a supplement to each of its tariffs affected hereby, in substantial accordance with the provisions of Rule 9(k) of the Commission's Tariff Circular No. 20 (§141.9(k) of this chapter), announcing such suspension.

(d) *Effective date.* This order shall become effective at 12:01 a.m., April 9, 1956.

[fol. 86a] (e) *Expiration date.* This order shall expire 11:59 p.m., December 31, 1956, unless otherwise modified, changed, suspended, or annulled by order of this Commission.

It is further ordered, That a copy of this order and direction shall be served upon the railroad regulatory body of each State and upon the Association of American Railroads, Car Service Division, as agent of the railroads subscribing to the car service and per diem agreement under the terms of that agreement, and all other carriers by railroad; and that notice of this order be given to the general public by depositing a copy in the office of the Secretary of the Commission at Washington, D. C., and by filing it with the Director, Division of the Federal Register.

(40 Stat. 101, Chap. 23; 41 Stat. 476, Sec. 402; 485, Sec. 418; 54 Stat. 901, Sec. 4; 912, Sec. 10; 49 U.S.C. 1(10)-(17), 15(4)).

By the Commission, Division 3.

HAROLD D. McCOY,
Secretary.

(SEAL)

A true copy.

/s/ Harold D. McCoy
Secretary of the Interstate
Commerce Commission.

[fol. 87]

ATTACHMENT No. 3 TO AFFIDAVIT

NOTICE

TITLE 49—TRANSPORTATION
CHAPTER I—INTERSTATE COMMERCE COMMISSION
SUBCHAPTER A—GENERAL RULES AND REGULATIONS

June 13, 1956

PART 95—CAR SERVICE

SERVICE ORDER No. 910

RAILROAD OPERATING REGULATIONS FOR THE MOVEMENT OF LOADED FREIGHT CARS

Pursuant to Notice of April 13, 1956, that in view of the temporary restraining order issued by the United States District Court for the District of Oregon, Civil Action No. 8541, dated April 7, 1956, no action would be taken to enforce Service Order No. 910 (21 F.R. 1798) until further order of the Commission, and said temporary restraining order having been dissolved.

It is Ordered hereby that on and after this date the provisions of said Service Order No. 910 (21 F.R. 1798) will be enforced by the Commission.

Notice hereof will be given to the general public by depositing a copy of this notice in the office of the Secretary of the Commission at Washington, D. C., and by filing it with the Director, Division of the Federal Register.

By the Commission.

HAROLD D. McCOY,
Secretary.

(SEAL)

A true copy:

/s/ Harold D. McCoy
Secretary of the Interstate
Commerce Commission.

[fol. 88]

ATTACHMENT No. 4 TO AFFIDAVIT

TITLE 49—TRANSPORTATION
CHAPTER I—INTERSTATE COMMERCE COMMISSION
SUBCHAPTER A—GENERAL RULES AND REGULATIONS

PART 95—CAR SERVICE

SERVICE ORDER No. 910-A

RAILROAD OPERATING REGULATIONS FOR THE MOVEMENT OF LOADED FREIGHT CARS

At a Session of the Interstate Commerce Commission, Division 3, held at its office in Washington, D. C., on the 6th day of December, A. D. 1956.

Upon further consideration of Service Order No. 910 (21 F.R. 2568) and good cause appearing therefor.

It is ordered, That:

§95.910 RAILROAD OPERATING REGULATIONS FOR THE MOVEMENT OF LOADED FREIGHT CARS, be and it is hereby vacated and set aside.

It is further ordered, That this order shall become effective at 12:01 a.m., December 8, 1956; that a copy of this order shall be served upon the State railroad regulatory bodies of each State, and upon the Association of American Railroads, Car Service Division, as agent of the railroads subscribing to the car service and per diem agreement under the terms of that agreement; and that notice of this order be given to the general public by depositing a copy in the office of the Secretary of the Commission at Washington, D. C., and by filing it with the Director, Division of the Federal Register.

(40 Stat. 101, Chap. 23; 41 Stat. 476, Sec. 402; 485, Sec. 418; 54 Stat. 901, Sec. 4; 912, Sec. 10; 49 U.S.C. 1(10)-(17), 15(4)).

By the Commission, Division 3.

HAROLD D. McCOY,
Secretary.

(SEAL)

A true copy:
/s/ Harold D. McCoy
Secretary of the Interstate
Commerce Commission.

[fol. 89]

EXHIBIT D TO MOTION FOR SUMMARY JUDGMENT

INTERSTATE COMMERCE COMMISSION
WASHINGTON 25

I, HAROLD D. McCOY, Secretary of the INTERSTATE COMMERCE COMMISSION, do hereby certify that the papers hereto attached (consisting of forty photostat sheets) are true copies of pages of schedules and Powers of Attorney filed with the said INTERSTATE COMMERCE COMMISSION on dates specified below, to wit:

Title Page and Pages 2, 8, 14, 43, 44, 45, 46, 47, 48, 49, 50 and 51 of Freight Tariff 4-D, Naming Car Demurrage Rules and Charges Storage Rules and Charges, H. R. Hinsch, Agent, I.C.C. 4808; said schedule having been filed November 25, 1957.

Power of Attorney FX1 No. 119 from Union Pacific Railroad Company to H. R. Hinsch, Agent, dated November 17, 1953, and filed with the said Interstate Commerce Commission March 31, 1954.

Title Page and Pages 3, 4, 14, 15, 17, 43, 46, 49, 51, 61, 205, 206, 207, 208, 209 and back cover page of Union Pacific Railroad Company, U.P.R.R. Tariff No. 4000-A, Local and Joint Freight Tariff Showing Official Distances, U.P.R.R. I.C.C. No. 5325; said schedule having been filed December 10, 1952.

Title Page and Pages 2, 8, 120, 157, 158, 159 and 169 of Consolidated Freight Classification 21, Western Classification No. 76, Geo. H. Dumas, Agent, I.C.C. No. 34; said schedule having been filed August 2, 1956.

Power of Attorney FX1 No. 106 from Union Pacific Railroad Company to Geo. H. Dumas, Agent, dated April 28, 1947, and filed with the said Interstate Commerce Commission February 19, 1948.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the Seal of said Commission this 7th day of May, A. D., 1958.

/s/ HAROLD D. McCOY
SECRETARY OF THE INTERSTATE
COMMERCE COMMISSION

[fol. 90]

Storage charges are subject to TARIFF OF INCREASED RATES AND CHARGES X-176-C, Agent H. R. Hinsch's I. C. C. 6679 and to Tariff of Increased Rates and Charges X-196-A, Agent H. R. Hinsch's I. C. C. 6717 and to Tariff of Increased Rates and Charges X-206-A, Agent H. R. Hinsch's I. C. C. 6760 and to Tariff of Increased Rates and Charges X-1967, Agent H. R. Hinsch's I. C. C. 6803, also supplements to or successive issues of said tariffs.

C. T. C. 2351
Cancels
C. T. C. 2272

I. C. C. 4806
Cancels
I. C. C. 4077

(For State Commission Numbers, See Page 3)

FREIGHT TARIFF 4-D
Cancels Freight Tariff 4-C

H. R. HINSCH, Agent

NAMING

CAR DEMURRAGE RULES AND CHARGES

STORAGE RULES AND CHARGES

APPLYING AT

ALL POINTS ON RAILROADS PARTIES HERETO
(Except as otherwise provided herein)

This tariff is also applicable on intrastate traffic except where expressly provided to the contrary in connection with particular items.

ISSUED NOVEMBER 22, 1967

EFFECTIVE JANUARY 1, 1968

Issued by
H. R. HINSCH, Agent,
22 W. Madison St.,
CHICAGO 2, ILL.

G.W.—6004

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SPECIAL NOTICE

This tariff makes no changes in the Demurrage and Storage Rules and Charges as published in Tariff 4-C except: Addition of Items 301 and 302 of Special Exceptions to Demurrage Rules and Charges; also in the list of participating carriers for account of carriers named or territories indicated on sets forth herein.

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This tariff is published under powers of attorney or concurrences issued by the carriers shown as parties hereto to Agent H. R. Hinsch, which powers of attorney and concurrences are on file with the Interstate Commerce Commission, Board of Transport Commissioners for Canada and the several State Commissions.

LIST OF PARTICIPATING CARRIERS

NAME OF CARRIER	Items Affecting Participation of Particular Carriers (See Note 1)	NAME OF CARRIER	Items Affecting Participation of Particular Carriers (See Note 1)
Aberdeen and Rockfish Railroad Company		Ashley, Drew & Northern Railway Company	
Abilene & Southern Railway Company (T & P Lines)		The Atchison, Topeka and Santa Fe Railway Company	42, 280, 280 to 315
The Alabama and Western Railway Company		Atlanta & Saint Andrews Bay Railway Company	
The Akron & Barberton Belt Railroad Company		Atlanta and West Point Rail Road Company	
The Akron, Canton & Youngstown Railroad Company		The Atlantic and Danville Railway Company	
Alabama Central Railroad Company		Atlantic and East Carolina Railway Company	
The Alabama Great Southern Railroad Company (See Southern Railway System)		Atlantic and Western Railway Company	45, 500.
Alabama, Tennessee and Northern Railroad Company		Atlantic Coast Line Railroad Company	783, 810
Alameda Belt Line		Augusta Railroad Company	
Albany and Northern Railway Company		Aurora, Elgin & Fox River Electric Company	400
Alexander Railroad Company		The Baltimore and Annapolis Railroad Company	
②Algers, Winslow and Western Railway Company		Baltimore and Eastern Railroad Company	
②Alleghany and Southern Railroad Company	488	The Baltimore and Ohio Chicago Terminal Railroad Company	
Almeter Railroad Company		The Baltimore and Ohio Railroad Company	780, 775
Alton and Southern Railroad		Bamberger Railroad Company	
③Amador Central Railroad Company		Bangor and Aroostook Railroad Company	820
Angelina & Neches River Railroad Company	40	Bath and Hammondsport Railroad Company	
The Ann Arbor Railroad Company	200	Bauxite & Northern Railway Company	
The Apache Railway Company		Beaufort and Morehead Railroad Company (A. T. Leary, Lessee)	
Appalachicola Northern Railroad Company		Beaver, Meade and Englewood Railroad Company	
Arcade and Attica Railroad Corporation		Belfast and Moosehead Lake Railroad Company	
The Arcata and Mad River Rail Road Company		Belleforte Central Railroad Company	
Arkansas & Louisiana Missouri Railway Company		The Belt Railway Company of Chicago	
Arkansas & Ozarks Railway Corporation		③Benwood and Wheeling Connecting Railway Company	
Arkansas Railroad Company	715		
The Arkansas Western Railway Company			
Aroostook Valley Railroad Company	820		

Note 1.—Items of general application affecting the participation of all or large groups or numbers of carriers are not listed in this column. See table of contents.

For explanation of reference marks, see concluding page of this tariff.

LIST OF PARTICIPATING CARRIERS—Concluded

NAME OF CARRIER	Items Affecting Participation of Particular Carriers (See Note 1)	NAME OF CARRIER	Items Affecting Participation of Particular Carriers (See Note 1)
Union Pacific Railroad Company	280, 418 to 475,640,660, 700, 705	(d)Washington, Idaho & Montana Railway Company	235
(d)Union Railroad Company	535, 595	Waterloo Railroad Company	
Union Railway Company (Memphis, Tenn.)		Waynesburg and Washington Railroad Company	340
Union Railroad of Oregon		The Weatherford, Mineral Wells and Northwestern Railway Company	
Union Terminal Railway Company (of St. Joseph, Mo.)		Wellsville, Addison & Galeton Railroad Corporation	
Unity Railways Company		Western Allegheny Railroad Company	345
Upper Merion and Plymouth Railroad Company		Western Maryland Railway Company	
Utah Railway Company	480	The Western Pacific Railroad Company	280, 480
Valdosta Southern Railroad		The Western Railway of Alabama	
Valley and Siletz Railroad Company		Western Transportation Company	
Ventura County Railway Company		West Pittston-Exeter Railroad Company	
Virginia and Carolina Southern Railroad Company		West Virginia Northern Railroad Company	
Virginia Blue Ridge Railway		Wharton and Northern Railroad Company	
Virginia Central Railway		White City Terminal & Utility Co.	
The Virginian Railway Company		White Sulphur Springs & Yellowstone Park Railway Company	
Visalia Electric Railroad Company (See Southern Pacific Lines)	755	Winchester and Western Railroad Company	
Wabash Railroad Company	220	The Winfield Railroad Company	
Ware, Beaumont, Trinity & Sabine Railway Company (T. L. Epperson, Receiver)		(d)Winifrede Railroad Company	
Wadley Southern Railway Company		Winston-Salem Southbound Railway Company	
Walla Walla Valley Railway Company		Wrightsville and Tennille Railroad Company	
Ware Shoals Railroad Company		(d)Wyandotte Southern Railroad Company	
Warren & Ouachita Valley Railway Company		(d)Wyandotte Terminal Railroad Company	
Warren & Saline River Railroad Company		Yakima Valley Transportation Company	
Warrenton Rail Road Company		Yancey Railroad Company	
Warwick Railway Company		(d)The Youngstown and Northern Railroad Company	542, 597
Washington and Old Dominion Railroad	770	Youngstown & Southern Railway Company	
		Yreka Western Railroad Company	

GENERAL APPLICATION OF TARIFF

The provisions of tariff of Increased Rates and Charges referred to on title page hereof will not apply on intrastate traffic, i. e., traffic between points in, and transported wholly within any State, until letter-number supplements are issued to Tariff of Increased Rates and Charges referred to on title page hereof, authorizing increases on such traffic.

RULES AND REGULATIONS

Item 15.

SUPPLEMENTS AND REISSUES

Where reference is made in this tariff or as same may be amended, to other publications for rates or other information, it includes "Supplements to or successive issues thereof."

Where reference is made in this tariff to Items it includes "reissues" of such Items.

Item 12.

Where reference is made in this tariff to another tariff, by I. C. C. Number, such reference applies also to such tariff as it may be applicable on intrastate traffic, or traffic within Canada.

(Items continued on page 14)

Note 1.—Items of general application affecting the participation of all or large groups or numbers of carriers are not listed in this column. See table of contents.

For explanation of reference marks, see concluding page of this tariff.

Section 1—Continued

(For preceding Items, see page 5)

GENERAL APPLICATION OF DEMURRAGE RULES AND CHARGES

Item	APPLICATION
20	(a) The Demurrage Rules and Charges, published in this tariff, are the separately established rules and charges of each of the participating carriers, and apply on International, Interstate and Intrastate traffic at all points on the railroads listed on pages 2 to 5, inclusive, except as otherwise specifically provided herein, and except, further, that the rules and charges will not apply in the Dominion of Canada (except as shown on pages 15 to 21, incl.), nor in the Republic of Mexico. (b) The disposition at point of detention determines the purpose for which a car is held and the rule applicable thereto, except where there is specific tariff provision to the contrary. (c) For the purpose of these rules, a privately owned or leased track, or any railroad track or portion thereof assigned for individual use or for joint use, will constitute an "other-than-public-delivery" track. (d) In connection with metered mail, the meter impression of date (and hour if shown) will be considered the postmark.
25	**LIST OF HOLIDAYS** Wherever in this tariff, reference is made to "holidays" it means the following: New Year's Day Washington's Birthday Memorial Day (See Note below) Independence Day Labor Day Thanksgiving Day Christmas Day In the event one of the above holidays occurs on Sunday, the following Monday will be considered as a holiday for the purpose of this tariff. Note.—Where provisions of State laws vary, the day referred to as Memorial Day being obscure, the date of the day referred to in the different states as "Memorial Day", "Decoration Day", or otherwise, and generally observed in lieu of May 30, will for the purpose of this item be treated as Memorial Day.

GENERAL EXCEPTIONS TO APPLICATION OF DEMURRAGE RULES AND CHARGES

Item	EXCEPTIONS
30	The following cars are not subject to Demurrage Rules and Charges, published in Section 1, pages 43 to 57, inclusive. (a) Cars handled in sugar cane service on Louisiana Intrastate traffic only. (b) At the ports on cars containing freight for trans-shipment to or from vessels and at Brownsville, Eagle Pass, El Paso, Laredo and Presidio, Texas, on cars containing export traffic, when rules and charges applicable thereto are provided in the tariffs of the individual carriers lawfully on file with the Interstate Commerce Commission, except to the extent indicated in such tariffs. This exception also applies to such cars when held in transit because they cannot reasonably be accommodated at the ports, and carload shipments loaded in open top equipment when held subject to Agent C. W. Boin's Tariff T-139-I, I. C. C. A-1114, and Agent H. R. Hinsch's Tariff 352-H, I. C. C. 4589. (c) Cars moved in milk, mixed or passenger trains and used in transporting milk or milk products as listed in tariffs of individual carriers, governing their transportation, lawfully on file with the Interstate Commerce Commission or State Railroad or Public Service Commission, when other rules or charges applicable to the detention of the cars are provided therein. (d) Cars leased for intra or inter plant service or for the storage of commodities, while held on tracks owned or leased by the lessee of the car, provided the use thereof is in no way connected with any transportation service for which a tariff charge is assessed, except switching charges.

(Concluded on following page)

Section 1—Continued

DEMURRAGE RULES AND CHARGES

RULE

Section A.—Cars of either railroad or private ownership, held for or by consignors or consignees for loading, unloading, forwarding directions or for any other purpose (including cars held for loading company material), and empty cars placed on orders which are not used in transportation service, are subject to these demurrage rules, except as provided in Section B.

Section B.—The following cars are not subject to these demurrage rules:

1. (a) Cars held for loading company material when the loading is done by the railroad for which the material is intended and on its tracks or private sidings connecting therewith.

(b) Cars under load with company material consigned to this railroad, and cars under load with such material which has been sold and delivered or tendered for delivery to the purchaser thereof, when the cars are held on the tracks of this railroad or private sidings connecting therewith.

(c) Cars loaded with company material delivered to an industry for processing or other handling for this railroad and empty cars held by an industry for loading such material for this railroad when the said loaded or empty cars are detained on this railroad's tracks or private siding connecting therewith.

2. Cars under load with Live Stock. This exemption does not include cars held for or by shippers for loading Live Stock. Live Poultry will not be considered as Live Stock.

3. Cars containing freight refused or unclaimed and subsequently sold by this railroad for charges, when and for the time held for convenience of this railroad beyond legal requirements.

Rule 1

Cars Subject to Rules; also Exemptions Therefrom

Item 600

(For exceptions, see Item 35)

4. (a) Private cars on private tracks when the ownership of the car and track is the same. (See Notes 1 and 2.)

Note 1.—For the purpose of applying this paragraph:

A private car is a car having other than railroad ownership.

As to tank cars and other special car types listed in Items 125, 130 and 305, H. R. Hinsch's Mileage Tariff 7-P, I. C. C. 4006, supplements thereto or successive issues thereof, and as to refrigerator cars leased to shippers under the provisions of Section 1, Rule 36, W. T. Jamison's Perishable Protective Tariff 17, I. C. C. 34, supplements thereto or successive issues thereof, a lease of a car is equivalent to ownership.

Private cars must have the full name of the owner or Reporting Marks assigned to the owner by the Association of American Railroads (see The Official Railway Equipment Register, I. C. C.-R. E. R. 324, issued by M. A. Zemdna, Agent), or the full name of the lessee painted or stenciled thereon or must be boarded with wooden, metal or cardboards showing the full name of owner or lessee accompanied by the words "leased to" or "lessee". If cardboarded for exemption while held for loading, the cardboard must also show the initials and number of car. If cardboarded for exemption while held for unloading, the cardboard must also show the initials and number of car and date of shipment. The application of this Note to leased cars shall be subject to the following conditions:

(1) When a leased car is held for loading, it shall not be exempted from demurrage unless evidence of lease to the owner of the track is on the car before expiration of free time.

(2) When a leased car is held for unloading, reconsignment or reshipment, it shall not be exempted from demurrage unless the name of the lessee accompanied by the words "leased to" or "lessee" is on the car and that fact is evidenced by a notation on the bill of lading or shipping order before the car leaves point of shipment, except that such notation will not be required when evidence of lease is painted or stenciled upon the car. In the event car arrives at destination with placards missing, the notation on bill of lading or shipping order shall govern.

(3) When a leased car is reconsigned or reshipped, it shall not be exempted from demurrage at the new destination unless evidence of lease to the owner of the track is on the car within forty-eight hours (exclusive of Saturdays, Sundays and the holidays listed in Item 35) from the next 7:00 A.M. after actual placement and unless the lease is evidenced by notation in the reconsigning or reshipping instructions, except that such notation will not be required when evidence of lease is painted or stenciled upon the car before the car is reconsigned or reshipped.

(4) When an empty car is leased for the storage of commodities only, it shall not be exempted from demurrage unless evidence of lease to the owner of the track is on the car within forty-eight hours (exclusive of Saturdays, Sundays and the holidays listed in Item 35) from the first 7:00 A.M. after actual placement, and unless evidence of lease is available for inspection by this railroad at storage point.

A Private Track is a track outside of his railroad's right of way, yard and terminals, and of which this railroad does not own either rails, ties, roadbed or right of way; when the same private track or portion thereof is used jointly by two or more parties, it will be considered the private track of each such joint user, provided that the owner notifies this railroad in writing of such joint use.

When a track or portion thereof owned or operated by this railroad is assigned to the purpose of its user through a written lease or written agreement, such lease or agreement will be considered as equivalent to ownership and the track or portion thereof treated as a private track. When such a track or portion thereof is used jointly by two or more parties, it will be considered the private track of each such joint user, provided the written consent to such joint use has first been obtained from this railroad.

(Concluded on next page)

Section 1—Continued

DEMURRAGE RULES AND CHARGES—Continued

	RULE
Rule 1 —Concluded **Cars Subject to Rules; also Exemptions Therefrom —Concluded** **Item 600 —Concluded** (For exceptions, see Item 35)	**Section B.—Concluded.** **Note 2.**—Private cars while held under constructive placement for delivery upon the tracks of their owners, are subject to demurrage charges after expiration of forty-eight (48) hours free time. (See Rule 5, pages 49 and 50 and Rule 9, pages 55 to 57.) (b) Empty private cars stored on railroad or private tracks, including such cars sent by the owner to a shipper for loading, provided the cars have not been placed or tendered for loading on the orders of a shipper. (See Rule 6, Section D, page 50.)
Rule 2 **Free Time Allowed** **Item 606** (For exceptions, see Items 250 to 490, incl.)	**Section A.—** 1. Except as otherwise provided in paragraph 3, of this section, forty-eight hours (two days) free time will be allowed to partly or completely load, to partly or completely unload, or to partly unload and partly reload, all commodities. "LOADING" must be completed in conformity with railroad loading, and clearance rules and includes the furnishing of forwarding directions on out-bound cars; also advice that car is ready for forwarding after being held to finish loading. (See Rule 6, Section C, page 50.) "UNLOADING" includes: (a) Surrender of bill of lading on shipments billed "to order". (b) Payment of lawful charges when required prior to delivery of the car. (c) Furnishing of a "turn-over" order (an order for delivery to another party after car has been placed for delivery and no additional movement of the car is made to a point beyond the confines of the same industry or same public delivery yard. (d) Advice that the car is ready for forwarding, accompanied by forwarding directions when necessary, after being held to partly unload or to partly unload and partly reload. **Note 1.**—If a consignee wishes his car held at any break-up or hold yard before placement, such car will be subject to demurrage. That is to say, the time held in the break-up or hold yard will be included in the detention chargeable to the consignee under the provisions of these rules. If he wishes to exempt his car from the imposition of demurrage, he must, either by general orders given to this railroad or by specific orders as to incoming freight, notify this railroad of the track upon which he wishes his freight placed, in which event he will have the full forty-eight (48) hours' free time from the time when the placement is made upon the track designated. The "Note" will apply, except when in conflict with Rule 2, Section B, Paragraph 1 below. 2. When the same car is both unloaded and reloaded, each transaction will be treated as independent of the other; except that, when loading is begun before unloading is complete, the free time for loading shall not begin to run until the first 7:00 A. M. after unloading is completed. This will also apply to industries performing their own switching service, in which case the industry must notify this railroad date and time car was unloaded promptly after car is unloaded. 3. (a) When a car placed for loading, whether or not partly loaded at point where so placed is moved by railroad or private power to another point within the confines of the same industry or the same public delivery yard to load, forty-eight (48) hours' free time will be allowed for the entire transaction, except that when this railroad makes a charge for such movement, the time incident thereto shall not be computed against the car. (See Rule 7, Note 2, page 50.) (b) When a car placed for unloading, whether or not partly unloaded at point where so placed is moved by this railroad or private power to another point within the confines of the same industry, or the same public delivery yard to unload, forty-eight (48) hours' free time will be allowed for the entire transaction, except that when this railroad makes a charge for such movement, the time incident thereto shall not be computed against the car. (See Rule 7, Note 3, page 50.) **Note.**—Movements made under this paragraph will not be considered as reconsignments for the purpose of applying demurrage rules. (Concluded on next page)

Section 1—Continued

DEMURRAGE RULES AND CHARGES—Continued

RULE

Section B.—Twenty-four hours' (one day) free time will be allowed except as otherwise provided in Rule 2, Section D, and Rule 3, Section B, Paragraph 2 (a):

1. When cars are held for reconsignment, diversion or reshipment, or held in transit on orders of consignor, consignee or owner. (See Rule 3, Section B, Paragraph 2, pages 46 and 47.)

Note 1.—Will not apply to cars subject to Rule 2, Section B, Paragraph 3 or Section D.

Note 2.—The term "diversion" or "reconsignment" will be applied as defined in the reconsignment tariffs of this railroad, except that under this rule, a "turn-over" (or order for delivery to another party) which does not involve an additional movement of the car to a point beyond the confines of the same industry or same public delivery yard is not a reconsignment for the purposes of applying these demurrage rules. (See Rule 2, Section A, above.)

Note 3.—A "reshipment" is the making of a new contract by which under a new rate the entire original lading, without being unloaded, is forwarded in the same car to another destination or another place of delivery at the same destination which requires a movement beyond the confines of the industry or the public delivery yard where the car has been originally delivered.

Rule 2
—Concluded

Free Time Allowed
—Concluded

Item 606
—Concluded

(For exceptions, see Items 250 to 490, incl.)

2. When cars destined for delivery to or forwarding via connecting line are held under tariff regulations for surrender of bill of lading or payment of lawful freight charges.

3. On cars containing freight in bond for Customs entry and Government inspection including reconsignment, diversion, or reshipment. (See Rule 8, Section F, page 54.)

4. When cars are held in transit because of any condition solely attributable to consignor, consignee or owner, not otherwise specifically provided for in these rules. (See Rule 3, Section G, page 47.)

Section C.—No free time will be allowed on cars received from another railroad and held by this railroad for forwarding directions, except that cars received between 4:00 P. M. and 7:00 A. M. will not be subject to demurrage if forwarding directions are received prior to the following 12:00 noon (exclusive of Saturdays, Sundays and holidays (See Item 25)). (See Rule 3, Section F, page 47.)

Section D.—When cars are held in transit and placed for inspection or grading, including reconsignment or other disposition orders, the free time for disposition will expire at 6:00 P. M. of the day following notice. At Stations where grain, seeds (field or grass), grain screenings, soybeans, hay, straw, corn husks or corn shucks, or pummies, unground, must be inspected or graded, the consignee agreeing with this railroad in writing for file at the station, to accept the bulletining of the cars as due and adequate notice of arrival, the bulletins must be posted by 9:00 A. M. of each day showing receipts since the last previous bulletin, and the free time is to be calculated from the first 7:00 A. M. thereafter. Where there is no agreement for bulletining of cars, the free time must be calculated from the first 7:00 A. M. after the notice of arrival is sent or given to the consignee.

Note 1.—In the application of this Section a demurrage day consists of a twenty-four (24) hour period computed from 6:00 P.M.

Note 2.—Any bulletin posted on a Saturday, Sunday or holiday listed in Item 25 shall, for the purpose of calculating free time, be treated as posted as of 9:00 A.M. the first day thereafter which is not a Saturday, Sunday or holiday listed in Item 25.

Section 1—Continued

DEMURRAGE RULES AND CHARGES

	RULE
	On cars consigned, reconsigned, or declared for export and tendered under the provisions of a port demurrage tariff, the contents of such cars being thereafter domesticated, thus bringing the demurrage transaction within the provisions of this tariff, time shall be computed from the first 7:00 A. M. after such tender.
	@For the purpose of computing time under these Rules, Saturdays, Sundays and holidays (See Item 25) will be excluded except as otherwise provided in Rule 6, Section B, page 50, Rule 7, Section A, page 51, Rule 8, Section C, page 54, and in Rule 9, Section A, page 55.
	@@For the purpose of computing time under these Rules, Saturdays, Sundays and holidays (See Item 25) will be excluded except as otherwise provided in Section B of Rule 6, page 50, Section C of Rule 8, page 54, and in Section A of Rule 9, page 55.
Rule 2 Computing Time Item 610 (For exceptions, see Items 490 to 540, incl.)	Section A.— 1. On cars for loading on other than public delivery tracks time will be computed from the first 7:00 A. M. after actual or constructive placement, and without notice of actual placement. (See Rule 3, Section A, Paragraph 1, page 44 and Rule 6—Cars for loading, page 50.) 2. On cars for loading on public delivery tracks, time will be computed from the first 7:00 A. M. after placement and without notice of actual placement; but if not placed within twenty-four hours after 7:00 A. M. of the date for which ordered, time will be computed from the first 7:00 A. M. after notice of placement is sent or given to consignee. (See Rule 2, Section A, Paragraph 1, page 44, and Rule 6—Cars for loading, page 50). 3. Forwarding directions for a car loaded outbound, sent by consignor by U. S. Mail to an agent of this railroad will be considered as having been received after 7:00 A. M. of the date received, when mailed on a prior date provided car is ready for forwarding at that time. This will also apply to cars received from a switching line and held by this railroad for forwarding directions. (See Sections A and C of Rule 2, pages 44 and 45.) Section B.— 1. On cars held for orders (other than orders for actual placement of cars subject to Sections D and E of this rule), and on cars requiring surrender of bill of lading or payment of lawful charges, whether such cars have been placed in position to unload or not, time will be computed from the first 7:00 A. M. after notice of arrival is sent or given to the consignee or party entitled to receive same. (See Rule 4—Notification, pages 48 and 49.) Note.—The time between receipt of order, surrender of bill of lading or payment of lawful charges and placement of car (not to include any time prior to beginning of free time nor time attributable to the act or neglect of consignee or consignee) will be deducted from the total detention to the car. 2. (a) When diversion or reconsignment is consummated on an order mailed, wired or otherwise transmitted by the reconsignor to an agent of this railroad or an agent of any railroad which has participated in the transportation transaction, such order will be considered as having been received after 7:00 A. M. of the date received, when order was forwarded on a prior date, or mailed, wired or otherwise transmitted between 12:01 A. M. and 7:00 A. M. of the date received. Note.—For the purpose of applying this Paragraph, the term "consummated" means movement of a car from the station where held or, if reconsigned to another location at the same station, the placement of the car at such other location. (b) When an order releasing a car is sent to this railroad by U. S. Mail, the date of mailing will be determined by the postmark. When such order or other document releasing a car is sent by U. S. Mail and is not received by the addressee, the car shall be considered released as of the date it should have been delivered, provided proof is furnished by the claimant that the order was deposited in the U. S. Mail, property stamped and addressed on the date claimed. (c) Cars held only for surrender of bills of lading or payment of lawful charges, subject to Rule 2, Section B, Paragraph 2, page 45, will be released at the time the bills of lading or lawful charges are received by an agent of this railroad or an agent of any railroad which has participated in the transportation transaction except that when bills of lading or lawful charges are mailed on one day and received on a later day, they will be considered as having been received after 7:00 A. M. of the date received.

(Concluded on next page)

@Will not apply on California Intrastate traffic.
@@Applies only on California Intrastate traffic.

Section 1—Continued

DEMURRAGE RULES AND CHARGES—Continued

RULE

Section B.—Concluded.

2. (d) When cars subject to Demurrage Rules are unloaded by this railroad and lading stored in or upon railroad premises, such cars shall be released:

1. At the time request is received when unloaded upon request of consignor or consignee, provided this railroad has obligated itself by tariff provisions to unload. In the absence of such tariff obligation, the car shall be released at the time unloading is completed.

2. At the time unloading is completed when unloaded for convenience of this railroad.

Note 1.—Freight unloaded by this railroad is subject to Section 2—Storage Rules and Charges from the time cars are released from demurrage rules and charges.

Rule 3 —Concluded

Computing Time —Concluded

Item 610 —Concluded

(For exceptions, see Items 620 to 640, incl.)

Section C.—

1. On cars held for unloading, except as otherwise provided in Section B, Paragraph 1, of this Rule, time will be computed from the first 7:00 A. M. after placement on public-delivery tracks, and after notice of arrival is sent or given to consignee or party entitled to receive same. If car is not placed within 24 hours from the first 7:00 A. M. after notice of arrival had been sent or given, time will be computed from the first 7:00 A. M. after notice of placement has been sent or given to the consignee or party entitled to receive same. (See Rule 4, Sections A and D, page 48.)

2. On cars subject to Rule 2, Section B, Paragraph 2, page 43, time will be computed from the first 7:00 A. M. after notice as received by Rule 2, Section B, Paragraph 1, page 43, is sent or given to the consignee or party entitled to receive same.

Section D.—Except as otherwise provided in Section B, Paragraph 1, of this Rule, on cars to be delivered on other-than-public-delivery tracks, time will be computed from the first 7:00 A. M. after actual or constructive placement on such tracks.

Time computed from actual placement on cars placed at exactly 7:00 A. M. will begin at the same 7:00 A. M.; actual placement to be determined by the precise time the engine cuts loose. (See Rule 4, Section C, page 48, and Rule 5, pages 49 and 50, and Rule 6, page 50.)

Note.—"Actual Placement" is made when a car is placed in an accessible position for loading or unloading or at a point previously designated by the consignor or consignee. If such placing is prevented from any cause attributable to consignor or consignee and car is placed on the private or other-than-public-delivery tracks serving the consignor or consignee, it shall be considered constructively placed without notice.

Section E.—Except as otherwise provided in Section B, Paragraph 1, of this rule, on cars to be delivered on interchange tracks of industrial plants performing the switching service for themselves or other parties, time will be computed from the first 7:00 A. M. after actual or constructive placement on such interchange tracks until return to the same or another interchange track. Time computed from actual placement on cars placed at exactly 7:00 A. M. will begin at the same 7:00 A. M.; actual placement to be determined by the precise time the engine cuts loose. (See Rule 2, Section A, Paragraph 2, page 44, Rule 4, Section C, page 48, Rule 5, pages 49 and 50 and Rule 6, page 50.) Cars returned loaded will not be recorded released until necessary billing instructions are furnished.

Note.—Where two or more parties each with its own power take delivery from the same interchange track, or where this railroad company uses the interchange track for other cars, or where the interchange track is not sufficient to the plant and the industry uses this railroad's trucks to reach same, a notice of placement shall be sent or given to the consignee and time will be computed from the first 7:00 A. M. thereafter.

Section F.—On cars received from another railroad and held by this railroad for forwarding directions, time will be computed without notice, from the first 7:00 A. M. after received. (See Rule 2, Section C, page 43.)

Section G.—On Cars subject to Rule 2, Section B, Paragraph 4, page 45 time will be computed from the first 7:00 A. M. after notice that the car has been stopped in transit and is being held, has been sent or given the consignor, consignee or party entitled to receive same.

Section H.—On cars subject to Rule 2, Section B, Paragraph 3, page 45, time will be computed from the first 7:00 A. M. after notice has been sent or given the consignee or party entitled to receive same.

Section 1—Continued

DEMURRAGE RULES AND CHARGES—Continued

RULE

Section A.—Except as otherwise provided in Section D, of Rule 2, page 45, or in Sections B, C or D of this Rule, notice of arrival shall be sent or given consignee or party entitled to receive same by this railroad's agent, in writing, or in lieu thereof, as otherwise agreed to in writing by this railroad and consignee within twenty-four hours (exclusive of Saturdays, Sundays and holidays (See Item 25)) after arrival of car and billing at destination, such notice to contain car initials and number, point of shipment, contents and, if transferred in transit, the initials and number of original car. When address of consignee does not appear on billing and is not known, the notice of arrival must be deposited in United States mail, bearing return address, same to be preserved on file, if returned. An impression copy shall be retained and when notice is sent or given on a postal card the impression shall be of both sides. (See Rule 3, Sections B and C, pages 46 and 47.) In case a car subject to Rule 3, Section C, Paragraph 1, page 47 is not placed on public delivery track within twenty-four hours the first 7:00 A. M. after notice of arrival has been sent or given, notice of placement shall be sent or given to consignee.

Note 1.—When owner requests that original point of shipment be omitted on reconsigned cars, this information shall not be shown on notice of arrival at destination.

Note 2.—Notice covering cars received from connecting line in switch movement for placement on public delivery track of this railroad: point of origin, contents, and reference to original car, if transferred in transit, will not be required, when line haul railroad has furnished this information as prescribed in Section A.

Section B.—When cars are ordered stopped in transit, notice shall be sent or given the party ordering the cars stopped, upon arrival of cars at point of stoppage.

Rule 4

Notification

Item 615

Note.—This will not apply to cars billed to be stopped in transit for milling or other in transit privilege. Notice shall be sent or given to the party designated to perform the milling or other in transit service.

Section C.—Delivery of cars upon other than public delivery tracks or upon industrial interchange tracks (except as provided in Note in Rule 3, Section E, page 47), or written notice sent or given to consignee or party entitled to receive same, of readiness to so deliver, will constitute notification to consignee. (See Rule 5, Section A, Paragraph 1, page 49 and Rule 8, Section D, Paragraph 1 (b), page 53.)

Section D.—In all cases where any part of the contents of a car has been inspected or removed by the consignee prior to the sending or giving of required notice, such inspection or removal shall be considered as notice of arrival.

Section E.—

1. When carload freight is refused at destination, this railroad shall, within twenty-four (24) hours (exclusive of Saturdays, Sundays and holidays (See Item 25)) after being advised of refusal, send notice of such refusal by wire to the consignor or owner when known, or when not known, to the agent at point of shipment, who shall promptly notify the consignor, if known.

2. (a) Except as otherwise provided in Note 1, when perishable carload freight has not been disposed of by this railroad and remains on hand undelivered at the expiration of three (3) days (exclusive of Saturdays, Sundays and holidays (See Item 25)) from the first 7:00 A. M. after notice of arrival has been sent or given to the consignee or party entitled to receive same, a notice to that effect shall, within twenty-four (24) hours thereafter, be sent by wire to the consignor or owner when known, or when not known, to the agent at point of shipment, who shall promptly notify the consignor, if known.

(Concluded on next page)

Section 1—Continued

DEMURRAGE RULES AND CHARGES—Continued

RULE

Section E.—Concluded.

2. (b) Except as otherwise provided in Note 1, when non-perishable carload freight has not been disposed of by this railroad and remains on hand undelivered at the expiration of five (5) days (exclusive of Saturdays, Sundays and Holidays (See Item 25)), from the first 7:00 A. M. after notice of arrival has been sent or given to the consignee or party entitled to receive same, a notice to that effect shall within twenty-four (24) hours thereafter, be sent by wire to the consignor or owner when known, or when not known, to the agent at point of shipment, who shall promptly notify the consignor, if known.

Rule 4
—Concluded

Notification
—Concluded

Item 615
—Concluded

Note 1.—Notices shall not be sent under the following circumstances:

(a) As to unclaimed shipments covered by straight bills of lading:

1. When actually placed on other than public delivery tracks, or on industrial interchange tracks.
2. When the consignee or party entitled to receive the freight has paid the freight charges at destination.
3. When the consignee or party entitled to receive the freight has ordered, in writing, the car placed for unloading.
4. When the consignor has advised either the destination or originating road-haul railroad, in writing, that such notice is not desired.
5. When consignor or owner has been previously sent or given a notice by wire that the car is being held at destination for disposition instructions.
6. When the consignor and consignee are the same and has been sent or given a notice of arrival.

(b) As to unclaimed shipments covered by to order bills of lading:

1. When the consignor has advised either the destination or originating road-haul railroad in writing that such notice is not desired.
2. When the bill of lading has been surrendered or indemnity bond furnished in lieu thereof.

(See Rule 8, Section D, Paragraph 4, page 53).

Note.—Under this rule the time of movement between hold point and destination and any other time for which the railroad is responsible will not be computed against the consignee.

Section A.—

1. When delivery of a car consigned or ordered to an industrial interchange track or to-other-than-a-public-delivery track cannot be made on account of the inability of the consignee to receive it, or because of any other condition attributable to the consignee, such car will be held at destination, or, if it cannot reasonably be accommodated there, at an available hold point, and written notice that the car is held and that this railroad is unable to deliver will be sent or given to the consignee. This will be considered constructive placement. (See Rule 3, Sections D and E, page 47.)

2. On a car to be delivered to a connecting railroad which that railroad is unable to receive from this railroad because the consignee located on its line or on a connecting railroad, is unable to receive, notice will be sent or given the delivering railroad showing car initials and number, contents and consignee and, if transferred in transit, the initials and number of the original car.

Rule 5

Placing Cars for Unloading

Item 630

(For exceptions, see Item 545)

3. When this railroad is the delivering railroad, and under conditions set forth in Paragraph 2, is unable to receive cars from a connecting railroad, upon receipt of notice from connecting railroad, it will send or give consignee written notice of constructive placement of such cars as set forth in Paragraph 1 of this section. (See Rule 4, Section C, page 48.)

Section B.—

1. Except as otherwise provided in Section C, of this Rule, when delivery cannot be made in a specially designated public delivery yard, including public delivery trestle tracks, on account of such yard being fully occupied, or from other causes beyond the control of this railroad, notice shall be sent or given the consignee in writing or, in lieu thereof, as otherwise agreed to in writing, that delivery will be made at the nearest available point to the consignee, naming the point (unless the consignee has notified this railroad that delivery at any other point is not desired). Such delivery shall be made unless the consignee shall, before delivery, indicate a preferred available point, in which case the preferred delivery will be made.

2. In the event consignee or party entitled to receive shipment has previously notified this railroad that delivery at another point is not desired or refuses to accept delivery at the point named in notice, sent or given in accordance with Paragraph 1, the car will be held awaiting opportunity to deliver in the specially designated public delivery yard subject to Rule 3, Section C, Paragraph 2, page 47.

(Concluded on next page)

Section 1—Continued

DEMURRAGE RULES AND CHARGES—Continued

	RULE
Rule 5 —Concluded **Placing Cars for Unloading** —Concluded **Item 620** —Concluded (For exceptions, see Item 545)	**Section C.**—When cranes or other special facilities furnished by this railroad are necessary for unloading because of the nature of the commodity, free time will start at the first 7:00 A. M. after notice has been sent or given to the consignee and after the first car consigned to that consignee is placed at the facility for unloading. When the consignee has other cars on hand waiting to be unloaded and he has uninterrupted use of the facility the time on all cars shall begin to run simultaneously with the placing of the first car at the facility and the sending of notice on each car following its arrival. **Note.**—Each consignee will be considered to have had uninterrupted use of the facility when one or more cars for unloading by him are placed or offered for placement each time the facility is switched.
Rule 6 **Cars for Loading** **Item 625** (For exceptions, see Item 550)	**Section A.**—Cars for loading will be considered placed when such cars are actually placed or held on orders of the consignor. In the latter case the agent must send or give the consignor written notice of all cars which he has been unable to place because of condition of the other-than-public-delivery track or because of other conditions attributable to the consignor. This will be considered constructive placement. (See Rule 3, Sections A, D and E, pages 46 and 47.) **Section B.**—When empty cars placed on orders are not used in transportation service, demurrage will be charged for all detention, including Saturdays, Sundays and holidays (See Item 25), from actual or constructive placement until released, with no free time allowance. When a car so ordered and placed on a public track is not used, and no advice from the party who ordered the car has been received within 48 hours (2 days) (exclusive of Saturdays, Sundays and holidays (See Item 25)) from the first 7:00 A. M. after placement, the car may be removed and treated as released at the time of removal. **Note.**—In the application of this Section, a demurrage day consists of a twenty-four hour period or fraction thereof computed from the hour of actual or constructive placement of the car, except that on cars placed in advance of the date for which ordered for loading, time will be computed from 7:00 A M. of the day for which so ordered. (See Section D.) **Section C.**—Private cars which have been loaded on the tracks of their owners, received from such tracks and held by this railroad for forwarding directions, are subject to demurrage charges from the first 7:00 A. M. after they are received until proper forwarding directions are furnished, with no free time allowance and without notice, except that cars received between 4:00 P. M. and 7:00 A. M. will not be subject to demurrage if forwarding directions are received prior to the following 12:00 noon (exclusive of Saturdays, Sundays and holidays (See Item 25)). **Section D.**— 1. If any empty car is appropriated, without being ordered, it shall be considered as having been ordered and actually placed at the time so appropriated. If not loaded outbound, such car is subject to Section B of this Rule. 2. When an empty car placed on an order of one party is appropriated by another party, without permission of this railroad, it shall be considered as having been initially ordered and placed on the order of the party appropriating the car.
Rule 7 **Demurrage Charges** **Item 630**	**Note 1.**—When, through no fault of the consignor or consignee, the lading of a car is transferred by a railroad into two or more cars or when two or more small cars are furnished by a railroad in lieu of one large car ordered by the shipper and freight charges are computed on the basis of one carload shipment, demurrage rules will be applied as for one car only, as long as any of such cars are detained. **Note 2.**—When a car is held for loading two or more carload shipments by more than one consignor at the same station, demurrage rules will be applied the same as if the shipments had been loaded in separate cars and each consignor will be allowed a total free time of forty-eight (48) hours (2 days) for loading free of interference by the other consignor or consignors. **Note 3.**—When a car contains two or more carload shipments consigned to more than one consignee at the same station, demurrage will be applied the same as if the shipments had been received in separate cars and each consignee will be allowed a total free time of 48 hours (2 days) for unloading, free of interference by the other consignee or consignees.

(Concluded on next page)

Section 1—Continued

DEMURRAGE RULES AND CHARGES—Continued

	RULE
Rule 7 —Concluded Demurrage Charges —Concluded Item 630 —Concluded	(28)**Section A.**—On cars not subject to Rule 9, Average Agreement, shown on pages 55 to 57, and for detention not subject to Rule 8, Section G, page 54, after the expiration of free time allowed or without free time allowance, when none is provided, the following demurrage charges per car per day, or fraction of a day, will be made until car is released (See Notes 1, 2 and 3): $4.00 for each of the first four days, $8.00 for each subsequent day, and the applicable demurrage charge will accrue on all Saturdays, Sundays and holidays (See Item 25) subsequent to the second chargeable day including a Saturday, Sunday or holiday (See Item 25) immediately following the day on which the second chargeable day begins to run except as otherwise provided in Rule 6, Section B, page 50, and Rule 8, pages 51 to 55. (29)**Section A.**—On cars not subject to Rule 9, Average Agreement, shown on pages 55 to 57, and for detention not subject to Rule 8, Section G, page 54. After the expiration of free time allowed or without free time allowance when none is provided the following demurrage charges per car per day, or fraction of a day, will be made until car is released (See Notes 1, 2 and 3): For each of the first four days $3.00. For each succeeding day $6.00. **Section B.**—The demurrage charges on cars subject to average agreement are set forth in Rule 9, pages 55 to 57. (See Notes 1, 2 and 3.) (See also Storage Rules and Charges, shown in Section 2, pages 58 to 73, inclusive, for additional charges on cars loaded with explosives and other dangerous articles, including cars handled under the Average Agreement.)
Rule 8 Claims Item 635 (For exceptions, see Items 555 and 560)	Demurrage charges assessed or collected for detention of cars through proximate causes named below will, subject to conditions set forth, be promptly cancelled or refunded. **CAUSES** **Section A.**—Weather interference. Frozen or Congealed Lading, Floods, Earthquakes, Hurricanes or Tornadoes. **Note.**—A consignor or consignee shall not be absolved from demurrage under Section A, Paragraph 1, of this Rule if, considering the character of the freight, others similarly situated and under the same conditions, reasonably could and did load or unload cars during the same period of time. 1. (a) When the condition of the weather during any part of the prescribed free time (or the adjusted free time provided for in Section B of this Rule) is such as to make it impossible to work at loading or unloading, or impossible to place freight in cars or move it from cars without serious injury to the freight, or when because of high water or snow drifts (See Note 1) it is impossible during the prescribed free time to get to the cars for loading or unloading, the free time will be extended until a total of forty-eight (48 hours) (seventy-two (72) or ninety-six (96) hours as the case may be, on cars subject to Rule 8, Section A, Paragraph 2) free from such interference shall have been allowed; provided, however, no such extension of free time will be allowed unless claim, stating fully the conditions which prevented loading or unloading within the free time, is presented in writing to this railroad within thirty days, exclusive of Saturdays, Sundays and holidays (See Item 25), after the date on which demurrage bill is rendered. **Note 1.—The extension of free time on account of high water and snow drifts should apply to:** **(a) Other-than-public-delivery tracks only when there is disability of this railroad.** **(b) Public delivery tracks only when such obstruction is on the premises of this railroad.** (b) On cars subject to Rule 6, Section B, page 50, when the condition of the weather during any part of the first forty-eight (48) hours after the time of placement is such as to make it impossible to work at loading or impossible to place freight in cars without serious injury to the freight, no demurrage shall be charged for the period of weather interference during such forty-eight (48) hours; provided, however, no such allowance will be made unless claim, stating fully the conditions which prevented loading during the first forty-eight (48) hours after time of placement is presented in writing to this railroad within thirty days exclusive of Saturdays, Sundays and holidays (See Item 25), after the date on which demurrage bill is rendered. (Continued on next page)

(28)Will not apply on California Intrastate traffic.
(29)Applies only on California Intrastate traffic.

86
[fol. 103]

I.C.C. 14

ORIGINAL

POWER OF ATTORNEY

(TO BE FILED WITH THE INTERSTATE COMMERCE COMMISSION)

FX1 No. 119

Cancels FX1 No. 111

UNION PACIFIC RAILROAD COMPANY
(CORPORATE NAME OF CARRIER)

(P. O. Address) OMAHA, NEBRASKA

November 17, 1953

KNOW ALL MEN BY THESE PRESENTS:

That the UNION PACIFIC RAILROAD COMPANY has made, constituted and appointed, and by these presents does make, constitute and appoint H. R. HINSCH its true and lawful attorney and agent for the said company, and in its name, place and stead, (1) for it alone, and (2) for it jointly with other carriers, to receive concurrences in, and to file, freight rate schedules and supplements thereto, as required of common carriers by the Interstate Commerce Act and by regulations established by the Interstate Commerce Commission thereunder, for the period of time, the traffic, and the territory now herein named:

Until revoked in accordance with the rules of the Interstate Commerce Commission.
All Freight Traffic;
All Territory.

INTERSTATE COMMERCE COMMISSION
RECEIVED
MAR 3 1 1954
FEDERAL TAX

And the said UNION PACIFIC RAILROAD COMPANY does hereby give and grant unto its said attorney and agent full power and authority to do and perform all and every act and thing above specified as fully, to all intents and purposes, as if the same were done and performed by the said company, hereby ratifying and confirming all that its said attorney and agent may lawfully do by virtue hereof, and assuming full responsibility for the acts and neglects of its said attorney and agent hereunder.

AND FURTHER, That the UNION PACIFIC RAILROAD COMPANY has made, constituted and appointed and by these presents does make, constitute and appoint as alternate H. M. Heimbaugh its true and lawful attorney and agent, for said Company and in its name, place and stead (1) for it alone, and (2) for it jointly with other carriers, in case and only in case of the death or disability of the said H. R. Hinsch, to do and perform the same acts and exercise the same authority as hereinabove granted to H. R. Hinsch.

IN WITNESS WHEREOF the said Company has caused these presents to be signed in its name by its vice - president and to be duly attested under its corporate seal by its assistant secretary, at Omaha, in the State of Nebraska, on this 17th day of November, in the year of our Lord, nineteen hundred and fifty-three

UNION PACIFIC RAILROAD COMPANY
(Corporate name of carrier)

By [signature]
Its Vice - President

[signature]
Assistant Secretary.

[CORPORATE SEAL]

U. P. R. R.—I. C. C. No. 5325
Cancels U. P. R. R.—I. C. C. No. 5113

U. P. R. R. TARIFF No. 4000-A

Cal. P. U. C. No. 60
Cancels Cal. P. U. C. No. 48

Colo. P. U. C. No. 543
Cancels Colo. P. U. C. No. 503

Ida. P. U. C. No. 898
Cancels Ida. P. U. C. No. 886

Mont. R. C. No. 150
Cancels Mont. R. C. No. 110

Nev. P. S. C. No. 176
Cancels Nev. P. S. C. No. 139

Ore. P. U. C. No. 842
Cancels Ore. P. U. C. No. 748

Utah P. S. C. No. 798
Cancels Utah P. S. C. No. 708

WN. T. No. 378
Cancels Wash. D. T. No. 337

Wyo. P. S. C. No. 668
Cancels Wyo. P. S. C. No. 597

Cancels U. P. R. R. Tariff No. 4000

UNION PACIFIC RAILROAD COMPANY

In Connection with Participating Carriers Shown on Page 2.

LOCAL AND JOINT FREIGHT TARIFF

SECTION OF TARIFFS
DEC 11 1952
INTERSTATE COMMERCE COMMISSION

SHOWING OFFICIAL DISTANCES

BETWEEN STATIONS NAMED HEREIN ON THE	AND STATIONS NAMED HEREIN ON THE
UNION PACIFIC RAILROAD	UNION PACIFIC RAILROAD

ALSO

BETWEEN	AND STATIONS NAMED HEREIN ON THE
OGDEN . . . . . UTAH	BAMBERGER RAILROAD
BUTTE . . . . . MONT. SILVER BOW . . . . . MONT.	BUTTE, ANACONDA & PACIFIC RAILWAY

ALSO
SHORT LINE DISTANCES AS PROVIDED IN SECTION E.

Issued December 10, 1952 **Effective January 20, 1953**

Departure from the terms of Rule 10(h) of Tariff Circular No. 20 is authorized under permission of the Interstate Commerce Commission No. 30051 of October 15, 1948, as amended.

E. G. CARLSON,
FREIGHT TRAFFIC MANAGER
OMAHA, NEBR.

Issued by
L. F. MACK,
CHIEF OF TARIFF BUREAU, U. P. R. R.
1416 DODGE ST., OMAHA (2), NEBR.

(91-170-182)

EXPLANATION OF ABBREVIATIONS—Concluded.

M. H.	Mount Hood Railroad Company
N. P.	Northern Pacific Railway Company
N. W. T.	Northwestern Terminal Railway Company, The
Ore. & N. W.	Oregon & Northwestern Railroad Co.
O. E.	Oregon Electric Railway Company
O. T.	Oregon Trunk Railway
Outer Har. Term.	Outer Harbor Terminal
P. C. R. R.	Pacific Coast R. R. Co.
P. E.	Pacific Electric Railway Company
Pen. Term.	Peninsula Terminal
Port. T.	Portland Traction Company
P. S. C.	Public Service Commission
P. S. N.	Puget Sound Navigation Company
P. U. C.	Public Utilities Commission
R. C.	Railroad Commission
St. J. Belt	St. Joseph Belt
St. J. Term.	St. Joseph Terminal
S. L. S. F.	St. Louis San Francisco Railway Company
S. L. G. & W.	Salt Lake, Garfield and Western Railway Company
S. O. Term.	South Omaha Terminal
S. P.	Southern Pacific Company
S. I.	Spokane International Railroad Company
S. P. & S.	Spokane, Portland & Seattle Railway Company
Sum. V.	Sumpter Valley Railway Company
T. V.	Tooele Valley Railway Company
U. P.	Union Pacific Railroad Company
U. R. of O.	Union Railroad of Oregon
Un. Term.	Union Terminal
Utah	Utah Railway Company
Wab.	Wabash Railroad Company
W. W. V.	Walla Walla Valley Railway Company
W. P.	Western Pacific Railroad Company, The
Y. V. T.	Yakima Valley Transportation Company

Item No.	RULES
	APPLICATION OF DISTANCES
5	The distances shown herein are in miles and are to be used on traffic moving under tariffs carrying rate lawfully published and filed with the Interstate Commerce Commission on interstate traffic and with State Commissions on intrastate traffic, where such tariffs so provide or make reference hereto.
	APPLICATION IN CONNECTION WITH STATIONS ON CACHE VALLEY, UTAH BRANCH. (Exceptions to Use of Actual Distance)
10	(a) On traffic between any of the following points on the U. P. McCammon, Idaho (Index 5910) Cache Jct., Utah (Index 6065) to Preston Idaho (Index 6215), incl. Hammond, Utah (Index 6220) to Arimo, Idaho (Index 6315 incl. use actual distance but NOT TO EXCEED 46 MILES. (See Note 1.) (b) On business between points Cache Junction, Utah to Preston and Weston, Ida., incl. (Index Nos. 6065 to 6255, incl.) on the one hand, and points east, north or west of McCammon, Ida. (Index No. 5910), on the other hand, disregard actual distance and use 46 miles south of McCammon, Ida., plus actual distance beyond. (See Note 1.) Example.—Actual distance between Franklin, Ida. and Butte, Mont. is 291 miles as shown on Page 163, but the distance to be used in calculating rates between Franklin, Ida., and Butte, Mont. is: Franklin to McCammon, Ida. ..... 46 miles Plus actual distance McCammon, Ida. to Butte, Mont. ..... 286 miles 332 miles Note 1.—The constructive mileage authorized by this exception cannot be used as a factor in computing distances from and to points east, north and west of McCammon, Idaho (Index 5910), on the one hand, to or from points on the U. P. south of Cache Junction, Utah (Index 6065), on the other hand.
	APPLICATION IN CONNECTION WITH STATIONS ON CONDA, IDAHO BRANCH
15	In applying distance rates published in Tariffs making reference to this distance table on traffic to or from stations on the Conda, Idaho Branch, viz.: Monsanto, Formation, Panting and Conda, Idaho, use mileage shown to or from, as the case may be, Soda Springs, Idaho. Exception.—For distances to apply between stations on the Conda, Idaho Branch, or between such stations and Soda Springs, Idaho, see Section B.

U. P. R. R. TARIFF No. 4000-A

Rule No.	RULES
	GENERAL APPLICATION
20	Except as otherwise provided in Items 10 and 30, the single factor through distances shown in Sections A and B will be the only recognized basis for computing freight rates under distance tariffs and distances obtained by the addition of mileages between several intermediate points may not be used.
	DISTANCES TO AND FROM GAY, IDAHO
25	Distances to and from Gay, Idaho, serving Gay Mine, will be constructed by adding 22 miles to the distances published to and from Ft. Hall, Idaho.
	STATUS OF STATIONS
30	This tariff is governed by the Official List of Open and Prepay Stations No. 67, A. P. Leland's I. C. C. No. A-32, supplements thereto and successive issues thereof, as to prepay requirements, changes in names of stations, additions and abandonment of stations, billing instructions from or to points not on railroads, restrictions as to non-acceptance or non-delivery of freight, and changes in station facilities.
	EXPLANATION OF SECTION A
35	Section A, Pages 17 to 114, inclusive, contains distances between Junction and Terminal Points on U. P.
	EXPLANATION OF SECTION B
40	Section B, pages 115 to 198, contains distances: (a) Between U. P. local stations, geographically arranged, (b) Between each local stations and the nearest junction or terminal point on either side, (c) Between each local stations and other points alphabetically listed in head-line. To compute the shortest distance between two local points located between the same junction or terminal points, obtain the distance to both local points from the same junction or terminal point and deduct one distance from the other. To compute the shortest distance between two local points not located between the same junction or terminal points, ascertain the distance in Section "B" from each of the local points to the junction points between which they are located and add thereto the distance shown in Section "A" between such junction points. Distance via junction points making lowest mileage will be proper through distance. Example.—Find distance from Cedell, Kan. to Fairfield, Ida. Cedell, Kan. to Plainville, Kan. ..... 2 miles. (Page 124) Fairfield, Ida. to Richfield, Ida. ..... 44 miles. (Page 172) Plainville, Kan. to Richfield, Ida. ..... 1160 miles. (Page 168) Total 1201 miles. Cedell, Kan. to Salina, Kan. ..... 96 miles. (Page 124) Fairfield, Ida. to Richfield, Ida. ..... 44 miles. (Page 172) Salina, Kan. to Richfield, Ida. ..... 1216 miles. (Page 194) Total 1357 miles. Lowest mileage via Plainville, Kan., or 1201 miles. To compute the distance between a local point and a junction or terminal point other than shown in head-line in Section "B", ascertain the distance from the local point to the junction points between which it is located in Section "B". To each of such distances add the distance shown in Section "A" from that junction point to the junction to which distance is desired. Distance via junction point making lowest mileage will be proper through distance.
	EXPLANATION OF SECTION C
45	Section C, Pages 199 and 200, contains distances between stations on the Bamberger Railroad, geographically arranged, and Ogden, Utah. Distances between local stations on the Bamberger Railroad and points on other lines named herein, will be computed in the same manner as provided in Item 40 in connection with points named in Section B.
	EXPLANATION OF SECTION D
50	Section D, Pages 201 and 202, contains distances between stations on the B. A. & P., geographically arranged, on the one hand, and Butte and Silver Bow, Mont., on the other hand. Distances between local stations on the B. A. & P. and points on other lines named herein, will be computed by ascertaining the distance from the local point on the B. A. & P. to Butte and Silver Bow, Mont. and add thereto the distance between those points and the point on the other line, computed as provided in Item 40. Distance via junction points making lowest mileage will be proper through distance.

ALPHABETICAL LIST OF STATIONS ON U. P. AT WHICH IT IS POSSIBLE TO INTERCHANGE CARLOAD TRAFFIC WITHOUT TRANSFER OF LADING AND NAME OF THE CONNECTING CARRIER AT EACH POINT WITH WHICH SUCH TRANSFER IS POSSIBLE.

U. P. STATION	CONNECTING CARRIER
Aberdeen ..... Wash	C. M. St. P. & P. N. P.
Abilene ..... Kan.	A. T. & S. F. C. R. I. & P.
Albion ..... Neb.	○ & N. W.
Ara ..... Colo.	○ C. & S.
Baker ..... Ore.	Sum. V.
Barstow ..... Cal.	A. T. & S. F.
Beatrice ..... Neb.	C. B. & Q. C. R. I. & P.
Belvoir ..... Kan.	M. P.
Bend ..... Ore.	G. N.
Black River Jct ..... Wash	C. M. St. P. & P. P. C. R. R. ○N. P.
Blair ..... Kan.	○ R. I. & P.
Blakesley Jct. ..... Wash.	○N. P.
Bonner Springs ..... Kan.	K. C. K. V.
Boulder ..... Colo.	C. & S.
Buena ..... Wash.	N. P.
Burke ..... Ida.	N. P.
Burns ..... Ore.	Ore. & N. W.
Butte ..... Mont.	‡B. A. & P. C. M. St. P. & P. G. N. N. P.
Central City ..... Neb.	C. B. & Q.
Centralia ..... Wash.	G. N. N. P.
Chehalis ..... Wash.	C. C. & C. C. M. St. P. & P. N. P.
Cheyenne ..... Wyo.	C. B. & Q. C. & S.
Clay Center ..... Kan.	C. R. I. & P.
Cochrane ..... Kan.	○M. P.
Colby ..... Kan.	C. R. I. & P.
Colton ..... Cal.	A. T. & S. F. P. E. S. P.
Columbus ..... Neb.	C. B. & Q.
Concordia ..... Kan.	A. T. & S. F. C. B. & Q. M. P.
Condon ..... Ore.	C. K. & Nou.
Council Bluffs ..... Iowa	C. & N. W. C. B. & Q. C. G. W. C. M. St. P. & P. C. R. I. & P. I. C. Wab.
Daggett ..... Cal.	A. T. & S. F.
Davenport ..... Neb.	C. & N. W.
David City ..... Neb.	C. B. & Q.
Dayton ..... Wash.	N. P.
Denver ..... Colo.	‡A. T. & S. F. C. B. & Q. C. R. I. & P. C. & S. ‡D. & I. M. D. & R. G. W. D. P. T. N. W. T.

U. P. STATION	CONNECTING CARRIER
Detroit ..... Kan.	A. T. & S. F. ‡C. R. I. & P.
Dishman ..... Wash.	C. M. St. P. & P.
East Garfield ..... Utah	W. P.
East Olympia ..... Wash.	○N. P.
East Portland ..... Ore.	‡Port. T. S. P. S. P. & S.
Eaton ..... Colo.	G. W.
Ellsworth ..... Kan.	S. L. S. F.
Elwood ..... Kan.	○C. R. I. & P.
Endicott ..... Neb.	C. B. & Q.
Eureka ..... Utah	D. & R. G. W.
Fairbury ..... Neb.	C. R. I. & P.
Fort Collins ..... Colo.	C. & S.
Fort Lewis ..... Wash.	○N. P.
Frankfort ..... Kan.	M. P.
Fremont ..... Neb.	C. & N. W. C. B. & Q.
Garfield ..... Utah	D. & R. G. W.
Garfield ..... Wash.	N. P.
Gilmore Jct. ..... Neb.	‡C. B. & Q. ○M. P.
Grand Island ..... Neb.	C. B. & Q.
Grandview ..... Wash.	N. P.
Greeley ..... Colo.	C. & S.
Hanover ..... Kan.	C. B. & Q.
Hastings ..... Neb.	C. B. & Q. M. P.
Hiawatha ..... Kan.	M. P.
Hood River ..... Ore.	M. H.
Hoquiam ..... Wash.	C. M. St. P. & P. N. P.
Huntsville ..... Wash.	N. P.
Ironton ..... Utah	○D. & R. G. W. ○Utah
Irving ..... Kan.	M. P.
Junction City ..... Kan.	M. K. T.
Kanopolis ..... Kan.	M. P.
Kansas City ..... Kan.	A. T. & S. F. C. G. W. C. R. I. & P. K. M. Ry. & T. K. C. S. K. C. T. M. P.
Kansas City ..... Mo	A. T. & S. F. C. B. & Q. C. G. W. C. M. St. P. & P. G. M. & O. K. C. S. K. C. T. M. K. T. M. P. S. L. S. F. Wab. ‡K. M. Ry. & T. ‡K. C. K. V. ‡K. C. Con.

○No facilities maintained for interchange of regular carload traffic.
‡Interchange over lines of another carrier.

ALPHABETICAL LIST OF STATIONS ON U. P. AT WHICH IT IS POSSIBLE TO INTERCHANGE CARLOAD TRAFFIC WITHOUT TRANSFER OF LADING AND NAME OF THE CONNECTING CARRIER AT EACH POINT WITH WHICH SUCH TRANSFER IS POSSIBLE.

U. P. STATION	CONNECTING CARRIER
Kearney ..... Neb.	C. B. & Q.
Kelim ..... Colo	G. W.
Kennewick ..... Wash.	N. P.
Lansing ..... Kan	A. T. & S. F.
Layton ..... Utah	◇D. & R. G. W.
Leavenworth ..... Kan.	‡A. T. & S. F.
	C. B. & Q.
	C. G. W.
	M. P.
Lehi ..... Utah	◇D. & R. G. W.
Limon ..... Colo.	C. R. I. & P.
Lincoln ..... Neb.	C. B. & Q.
	‡C. & N. W.
	‡C. R. I. & P.
	M. P.
Lindsborg ..... Kan	M. P.
Long Beach ..... Cal	A. T. & S. F.
	P. E.
	S. P.
Los Angeles ..... Cal.	A. T. & S. F.
	L. A. Jct.
	P. E.
	S. P.
Los Angeles Harbor ..... Cal.	A. T. & S. F.
	Outer Har. Term.
	P. E.
	S. P.
McPherson ..... Kan.	A. T. & S. F.
	‡C. R. I. & P.
	M. P.
Manhattan ..... Kan	C. R. I. & P.
Marengo ..... Wash	C. M. St. P. & P.
Mead ..... Cal.	◇S. P.
Midvale ..... Utah	D. & R. G. W.
Milliken ..... Colo.	G. W.
Milton-Freewater ..... Ore.	W. W. V.
Miltonvale ..... Kan.	A. T. & S. F.
Minneapolis ..... Kan.	A. T. & S. F.
Montesano ..... Wash.	C. M. St. P. & P.
	N. P.
Moscow ..... Ida.	G. N.
	N. P.
Murray ..... Utah	D. & R. G. W.
Norfolk ..... Neb.	C. & N. W.
	C. St. P. M. & O.
Northport ..... Neb.	C. B. & Q.
North Portland ..... Ore.	Pen. Term.
	S. P. & S.
North Salt Lake ..... Utah	D. & R. G. W.
Oakesdale ..... Wash.	G. N.
Ogden ..... Utah	Bam.
	D. & R. G. W.
	S. P.
Olympia ..... Wash.	N. P.
Omaha ..... Neb.	C. & N. W.
	C. B. & Q.
	C. G. W.
	C. M. St. P. & P.
	C. R. I. & P.
	C. St. P. M. & O.
	I. C.
	M. P.
	Wab.

U. P. STATION	CONNECTING CARRIER
Pallas ..... Utah	◇D. & R. G. W.
Pendleton ..... Ore.	N. P.
Plummer ..... Ida.	C. M. St. P. & P.
Portland ..... Ore.	G. N.
	N. P.
	O. E.
	S. P. & S.
	S. P.
Prineville Jct. ..... Ore.	C. of P.
Provo ..... Utah	D. & R. G. W.
	Utah
Pullman ..... Colo.	C. R. I. & P.
	N. W. T.
Riparia ..... Wash.	Cam. P.
	◇N. P.
Riverside ..... Cal.	A. T. & S. F.
	P. E.
	S. P.
Rocky Point ..... Wash.	Col. & C.
St. Clair ..... Wash.	◇N. P.
St. Joseph ..... Mo.	A. T. & S. F.
	C. B. & Q.
	C. G. W.
	C. R. I. & P.
	M. P.
	St. J. Belt
	St. J. Term.
	Un. Term.
Salina ..... Kan.	A. T. & S. F.
	C. R. I. & P.
	M. P.
Salt Lake City ..... Utah	Bam.
	D. & R. G. W.
	S. L. G. & W.
	W. P.
San Bernardino ..... Cal.	A. T. & S. F.
	‡P. E.
Sandy ..... Utah	◇D. & R. G. W.
Sawyer ..... Wash.	N. P.
Seattle ..... Wash.	C. M. St. P. & P.
	G. N.
	N. P.
	P. C. R. R.
	‡P. S. N.
Sidney ..... Neb.	C. B. & Q.
Silver Bow ..... Mont.	B. A. & P.
	C. M. St. P. & P.
	N. P.
Solomon ..... Kan.	A. T. & S. F.
	‡C. R. I. & P.
South Omaha ..... Neb.	C. B. & Q.
	C. G. W.
	C. M. St. P. & P.
	C. & N. W.
	C. R. I. & P.
	‡I. C.
	‡M. P.
	S. O. Term.
	‡Wab.
Spanish Fork ..... Utah	◇D. & R. G. W.
Spokane ..... Wash.	C. M. St. P. & P.
	G. N.
	N. P.
	S. I.
	S. P. & S.

◇No facilities maintained for interchange of regular carload traffic.
‡Interchange over lines of another carrier.
①Interchange is only permitted on shipments of company mail.
②Interchange point for inter-yard switching of local carload freight only.

SECTION A (See Note)

MILEAGE BETWEEN JUNCTION POINTS
AND TERMINAL POINTS.

Distances in this Section are between Junction and Terminal Points on U. P. and in all cases are based on shortest distance via that line.

See pages 14 to 16, for list of stations also served by other railroads showing which are Junction Points with such connections.

The headline and sideline stations are in alphabetical order.

The distance between any two stations is shown only once.

NOTE.—To arrive at the distance between two stations in this Section use station coming first alphabetically as the headline station, the station coming last as the side-line station, and at the intersection, the distance will be found. For example: To arrive at the distance between Omaha, Neb. and Los Angeles, Cal. find Los Angeles, Cal., in the heading and Omaha, Neb., at the side of the page.

SECTION A—DISTANCE IN MILES

BETWEEN / AND	Caldwell, Ida.	Caliente, Nev.	Carden, Kan.	Cedar City, Utah	Central City, Neb.	Centralia, Wash.	Chehalis, Wash.	Cheyenne, Wyo.	Clay Center, Kan.	Cloverly Jct., Colo.	Coalmont, Colo.	Colby, Kan.	Colfax, Wash.
Caldwell ..... Ida.	0												
Caliente ..... Nev.	746	0											
Carden ..... Kan.	1283	1324	0										
Cedar City..... Utah	697	114	1275	0									
Central City.... Neb.	1188	1229	165	1179	0								
Centralia ..... Wash.	549	1295	1832	1246	1737	0							
Chehalis ..... Wash.	545	1292	1829	1242	1733	4	0						
Cheyenne ..... Wyo.	803	844	480	795	385	1352	1349	0					
Clay Center..... Kan.	1388	1429	113	1379	269	1937	1933	585	0				
Cloverly Jct.... Colo.	847	887	499	838	403	1396	1392	56	588	0			
Coalmont ..... Colo.	858	899	648	849	552	1407	1403	168	732	211	0		
Colby ..... Kan.	1177	1218	330	1169	487	1726	1723	387	281	338	542	0	
Colfax ..... Wash.	433	1180	1716	1130	1621	426	422	1236	1821	1280	1291	1611	0
Colton ..... Cal.	1140	394	1718	508	1623	1689	1686	1238	1823	1281	1293	1612	1374
Columbus ..... Neb.	1228	1269	195	1220	40	1777	1774	425	300	444	593	517	1661
Concordia ..... Kan.	1427	1468	152	1418	309	1976	1972	624	39	627	791	323	1860
Condon ..... Ore.	370	1116	1653	1066	1557	269	265	1173	1757	1216	1227	1547	246
Connell ..... Wash.	419	1165	1702	1116	1607	411	408	1222	1807	1266	1277	1596	80
Corlett Jct..... Wyo.	799	839	485	790	389	1348	1344	5	589	51	163	382	1232
Council Bluffs.... Ia.	1313	1353	166	1304	125	1862	1858	510	271	528	677	488	1746
Crestmore ..... Cal.	1163	417	1741	531	1645	1712	1708	1261	1845	1304	1315	1635	1596
Cutler ..... Utah	451	312	1028	262	933	1000	996	548	1133	592	603	923	884
Daggett ..... Cal.	1047	301	1625	415	1529	1595	1592	1145	1729	1188	1199	1519	1480
Davenport ..... Neb.	1201	1242	82	1192	83	1750	1746	398	187	416	565	404	1634
David City..... Neb.	1241	1281	124	1232	53	1790	1786	437	229	456	605	446	1674
Dayton ..... Wash.	331	1077	1614	1028	1519	368	364	1134	1719	1178	1189	1508	106
Declo ..... Ida.	206	584	1121	535	1025	755	751	641	1225	684	695	1015	639
Delta ..... Utah	556	190	1134	141	1039	1106	1102	654	1239	698	709	1028	990
Dent ..... Colo.	858	899	495	850	399	1408	1404	68	573	20	223	323	1292
Denver ..... Colo.	897	938	533	888	438	1446	1442	106	534	58	261	285	1330
Detroit ..... Kan.	1373	1414	99	1363	255	1923	1919	570	52	535	738	232	1807
Dillon ..... Mont.	446	689	1226	639	1130	905	901	746	1330	789	800	1120	879
Dines ..... Wyo.	524	565	786	515	691	1073	1069	306	891	350	361	680	957
Dishman ..... Wash.	470	1217	1753	1166	1658	463	459	1273	1858	1317	1328	1648	82
Douglas Jct..... Cal.	1214	467	1791	582	1696	1763	1759	1311	1896	1355	1366	1685	1647
East Garfield...Utah	438	309	1015	259	920	987	983	535	1120	579	590	909	871
East Olympia...Wash.	568	1314	1851	1265	1756	19	23	1371	1956	1415	1426	1745	445
East Portland....Ore.	462	1209	1745	1159	1650	91	88	1265	1850	1309	1320	1640	339
East Yard..... Cal.	1201	455	1779	569	1683	1750	1746	1299	1883	1342	1353	1673	1634
Eaton ..... Colo.	838	878	500	829	405	1387	1383	47	580	0	202	340	1271
Echo ..... Utah	425	401	923	351	828	975	971	443	1028	487	498	817	859
Egbert ..... Wyo.	835	876	448	827	353	1384	1381	32	553	88	200	419	1268
Elko ..... Wyo.	432	557	869	508	774	981	977	389	974	432	444	763	865
Ellis ..... Kan.	1230	1270	243	1221	400	1779	1775	439	197	391	594	96	1663
Ellsworth ..... Kan.	1309	1350	164	1300	320	1858	1854	518	118	470	674	176	1742
Elwood ..... Kan.	1391	1432	108	1382	273	1940	1936	588	221	606	755	438	1824
Emmett ..... Ida	36	764	1301	715	1206	542	538	821	1406	865	876	1195	426
Encampment ... Wyo.	695	736	677	686	581	1244	1240	196	781	240	251	571	1128
Endicott ..... Neb.	1245	1286	38	1236	127	1794	1790	442	143	460	609	360	1678
Eureka ..... Utah	511	243	1088	193	993	1060	1056	608	1193	652	663	983	944
Fairbury ..... Neb.	1239	1280	44	1230	121	1788	1784	436	149	455	604	366	1672
Fillmore ..... Utah	589	222	1166	173	1071	1138	1134	686	1271	730	741	1060	1022
Fort Collins.... Colo.	883	924	550	875	424	1433	1429	93	598	43	248	348	1317
Fort Francis E. Warren ..... Wyo.	806	847	483	797	387	1355	1351	3	587	59	170	389	1239
Fort Leavenworth ..... Kan.	1423	1464	140	1415	305	1972	1969	620	169	638	787	388	1857
Fort Lewis..... Wash.	582	1328	1865	1279	1770	33	37	1385	1970	1429	1440	1759	450
Frankfort ..... Kan.	1296	1337	13	1287	178	1845	1841	493	126	511	660	343	1729
Fremont ..... Neb.	1273	1314	150	1265	86	1823	1819	470	254	489	638	472	1707

SECTION A—DISTANCE IN MILES

BETWEEN / AND	Caldwell, Ida.	Caliente, Nev.	Garden, Kan.	Cedar City, Utah	Central City, Neb.	Centralia, Wash.	Chehalis, Wash.	Cheyenne, Wyo.	Clay Center, Kan.	Cloverly Jct., Colo.	Coalmont, Colo.	Colby, Kan.	Colfax, Wash.
Oakesdale .....Wash.	447	1193	1730	1144	1635	439	436	1250	1835	1294	1305	1624	42
Oakley .....Ida.	219	597	1134	547	1038	768	764	654	1238	697	708	1028	652
Oakley .....Kan.	1155	1196	318	1147	474	1705	1701	365	271	317	520	22	1589
Oconee .....Neb.	1238	1278	204	1229	50	1787	1783	434	309	453	602	526	1671
O'Fallons .....Neb.	1012	1053	271	1003	176	1561	1557	209	376	227	376	542	1445
Ogden .....Utah	386	361	963	311	868	935	931	483	1068	527	538	857	819
Ogden Sugar Works .....Utah	389	364	966	314	871	938	934	486	1071	530	541	860	822
Olympia .....Wash.	576	1322	1859	1272	1763	26	30	1379	1963	1422	1433	1753	452
Omaha .....Neb.	1310	1351	164	1301	122	1859	1855	507	268	525	674	485	1743
Orchard .....Ida.	43	704	1241	654	1145	592	588	761	1345	804	815	1135	476
Ord .....Neb.	1227	1268	204	1218	83	1776	1772	424	308	442	591	526	1660
Oregon Trunk Jct. .....Ore.	368	1114	1651	1064	1555	182	178	1171	1755	1214	1225	1545	244
Orvin .....Ida.	305	548	1085	429	990	854	851	605	1190	649	660	979	738
Ostrander .....Wash.	509	1256	1793	1206	1697	40	36	1313	1897	1356	1367	1687	386
Pallas .....Utah	430	332	1007	283	912	979	975	527	1112	571	582	901	863
Park City .....Utah	454	429	951	379	856	1003	999	471	1056	515	526	845	887
Parkdale Jct. ....Colo.	882	923	519	874	424	1431	1428	92	556	44	247	307	1316
Pasadena .....Cal.	1215	469	1792	583	1697	1764	1760	1312	1897	1356	1367	1687	1648
Payette .....Ida.	37	783	1320	734	1225	512	508	840	1425	884	895	1214	396
Pendleton .....Ore.	247	993	1530	944	1435	302	298	1050	1635	1094	1105	1424	186
Pendleton Jct. ....Ore.	246	992	1529	943	1434	303	299	1049	1634	1093	1104	1423	187
Peninsula Jct. ....Ore.	464	1210	1747	1161	1651	86	83	1267	1851	1310	1321	1641	340
Peterson .....Ida.	281	525	1062	475	966	831	827	582	1166	625	636	956	715
Pilot Rock .....Ore.	385	1011	1548	962	1453	313	309	1068	1653	1112	1123	1442	197
Pioche .....Nev.	779	53	1357	147	1261	1328	1324	877	1461	920	931	1251	1212
Plainville .....Kan.	1277	1318	230	1269	387	1826	1823	487	184	438	642	100	1711
Plummer .....Ida.	477	1223	1760	1173	1664	489	485	1280	1864	1323	1334	1654	54
Pocatello .....Ida.	252	495	1032	445	936	801	797	552	1136	595	606	926	685
Pomeroy .....Wash.	406	1152	1689	1103	1594	398	395	1209	1794	1253	1264	1583	99
Portland .....Ore.	463	1210	1746	1160	1651	92	89	1266	1851	1310	1321	1641	340
*Preston .....Ida.	388	460	1063	411	967	937	933	583	1167	626	637	957	821
Prince .....Nev.	787	41	1365	155	1270	1336	1333	885	1470	928	940	1259	1221
Prince Jct. .....Nev.	779	32	1356	147	1261	1328	1324	876	1461	920	931	1250	1212
Prineville Jct. ....Ore.	499	1245	1782	1196	1687	313	309	1302	1887	1346	1357	1676	375
Provo .....Utah	469	293	1047	244	951	1018	1014	567	1151	610	621	941	902
Pullman .....Colo.	895	935	531	886	436	1444	1440	104	532	56	259	283	1328
Puritan .....Colo.	884	925	520	876	425	1433	1430	93	557	45	248	308	1317
Radiant .....Wyo.	433	559	870	509	775	983	979	390	975	434	445	764	867
Rawlins .....Wyo.	630	671	653	621	558	1179	1175	178	758	217	228	547	1063
Reliance Jct. ....Wyo.	516	557	778	507	682	1065	1061	298	882	341	353	672	949
Reliance Mine..Wyo.	518	559	780	509	684	1067	1063	300	884	343	355	674	951
Relief .....Wash.	382	1128	1665	1079	1569	374	370	1185	1769	1228	1239	1559	74
Richfield .....Ida.	159	618	1155	568	1059	708	705	675	1259	718	729	1049	593
Richland .....Wash.	337	1084	1621	1034	1525	330	326	1141	1725	1184	1195	1515	152
Richland Jct. ..Wash.	328	1075	1612	1025	1516	321	317	1132	1716	1175	1186	1506	143
Rieth .....Ore.	251	997	1534	948	1439	298	295	1054	1639	1098	1109	1428	182
Riford .....Neb.	943	984	427	935	332	1493	1489	140	532	196	308	527	1377
Riparia .....Wash.	377	1124	1660	1074	1565	370	366	1180	1765	1224	1235	1555	60
Riverside .....Cal.	1147	401	1725	515	1630	1696	1693	1245	1830	1288	1300	1619	1581
Robinette .....Ore.	105	851	1388	801	1292	510	507	908	1492	951	962	1282	395
Rock Springs...Wyo.	511	551	773	502	677	1060	1056	293	877	336	347	667	944
Rocky Point...Wash.	508	1254	1791	1205	1695	42	38	1311	1895	1354	1365	1685	384
Rupert .....Ida.	180	567	1104	517	1008	738	734	624	1208	667	678	998	622
St. Anthony .....Ida.	339	582	1119	533	1024	888	884	639	1224	683	694	1013	772
St. Clair .....Wash.	575	1321	1858	1272	1763	26	30	1378	1963	1422	1433	1752	451
St. Johns Jct. ....Ore.	466	1212	1749	1163	1654	88	84	1269	1854	1313	1324	1643	342
St. Joseph .....Mo.	1392	1433	109	1383	274	1941	1937	589	222	608	756	439	1825
St. Paul .....Neb.	1188	1228	165	1179	44	1737	1733	385	269	403	552	487	1621
St. Vrains .....Colo.	879	920	515	870	420	1428	1424	88	552	40	243	303	1312
Salina .....Kan.	1346	1387	127	1338	283	1895	1892	555	81	507	711	204	1779
Salt Lake City .....Utah	422	325	999	275	904	971	967	519	1104	563	574	894	855
San Bernardino..Cal.	1137	391	1714	505	1619	1686	1682	1234	1819	1278	1289	1609	1570
Sand Creek Jct..Colo.	892	933	528	883	433	1441	1437	101	535	53	256	286	1325
Sandy .....Utah	434	328	1012	279	917	984	980	532	1117	576	587	906	868

*See Item 10.

SECTION A—DISTANCE IN MILES

BETWEEN / AND	Colton, Cal.	Columbus, Neb.	Concordia, Kan.	Condon, Ore.	Connell, Wash.	Corlett Jct., Wyo.	Council Bluffs, Ia.	Crestmore, Cal.	Cutler, Utah	Daggett, Cal.	Davenport, Neb.	David City, Neb.	Dayton, Wash.	Declo, Ida.
Colton ..... Cal.	0													
Columbus ..... Neb.	1663	0												
Concordia ..... Kan.	1862	339	0											
Condon ..... Ore.	1510	1598	1796	0										
Connell ..... Wash.	1559	1617	1816	232	0									
Corlett Jct..... Wyo.	1233	430	628	1168	1218	0								
Council Bluffs..... Ia.	1747	85	310	1682	1732	514	0							
Crestmore ..... Cal.	23	1686	1884	1533	1582	1256	1770	0						
Cutler ..... Utah	706	973	1172	820	870	544	1058	728	0					
Daggett ..... Cal.	93	1570	1769	1416	1465	1140	1654	116	612	0				
Davenport ..... Neb.	1690	123	226	1571	1620	402	208	1678	946	1543	0			
David City..... Neb.	1675	93	268	1610	1659	442	89	1698	986	1582	135	0		
Dayton ..... Wash.	1471	1559	1758	189	182	1130	1644	1494	782	1377	1332	1571	0	
Declo ..... Ida.	978	1066	1265	575	625	636	1150	1001	288	885	1039	1078	537	0
Delta ..... Utah	584	1079	1278	926	975	650	1164	607	122	491	1052	1091	887	394
Dent ..... Colo.	1293	440	612	1228	1277	63	524	1316	604	1200	413	452	1189	696
Denver ..... Colo.	1332	478	573	1266	1316	102	563	1354	642	1238	451	490	1228	734
Detroit ..... Kan.	1808	285	92	1743	1792	579	237	1831	1119	1715	172	215	1704	1211
Dillon ..... Mont.	1083	1171	1369	815	865	741	1255	1106	393	990	1144	1183	777	283
Dines ..... Wyo.	959	731	930	804	943	302	816	982	269	866	704	743	855	362
Dishman ..... Wash.	1611	1698	1897	283	126	1269	1783	1633	921	1517	1671	1711	233	676
Douglas Jct..... Cal.	73	1736	1935	1583	1633	1307	1821	64	779	160	1709	1749	1545	1051
East Garfield... Utah	702	969	1159	807	856	531	1045	726	45	610	933	972	768	275
East Olympia... Wash.	1708	1796	1995	288	431	1367	1881	1731	1019	1614	1709	1809	387	774
East Portland.... Ore	1693	1690	1889	182	324	1261	1775	1625	913	1509	1663	1703	281	668
East Yard..... Cal	61	1721	1922	1571	1620	1294	1809	51	766	154	1697	1736	1532	1039
Eaton ..... Colo.	1272	415	628	1207	1257	42	529	1295	583	1179	418	457	1169	675
Echo ..... Utah	795	868	1067	795	844	439	953	817	105	702	841	881	756	263
Egbert ..... Wyo.	1270	393	592	1205	1254	37	478	1293	580	1177	366	405	1166	673
Elkol ..... Wyo.	951	814	1013	802	851	384	898	974	262	858	787	826	763	270
Ellis ..... Kan.	1664	450	236	1599	1648	434	401	1687	925	1571	317	359	1560	1067
Ellsworth ..... Kan.	1744	350	137	1679	1728	514	322	1767	1024	1651	238	280	1640	1147
Elwood ..... Kan.	1826	502	260	1760	1810	592	274	1848	1136	1733	190	232	1722	1229
Emmett ..... Ida.	1158	1246	1445	362	412	817	1331	1181	469	1065	1219	1259	324	224
Encampment ... Wyo.	1130	622	820	1065	1114	192	706	1153	440	1037	593	634	1058	533
Endicott ..... Neb.	1680	167	182	1615	1664	446	196	1702	990	1587	44	134	1576	1083
Eureka ..... Utah	637	1033	1232	880	929	604	1118	659	118	544	1006	1046	842	348
Fairbury ..... Neb.	1674	161	188	1609	1658	440	202	1697	984	1581	38	160	1570	1077
Fillmore ..... Utah	616	1111	1310	958	1008	682	1196	639	154	523	1084	1124	920	426
Fort Collins .... Colo.	1318	465	637	1253	1302	88	549	1341	629	1225	438	477	1214	721
Fort Francis E. Warren ..... Wyo.	1241	428	626	1175	1225	7	512	1263	551	1148	401	440	1137	644
Fort Leavenworth ..... Kan.	1858	535	208	1793	1842	624	306	1881	1169	1763	222	264	1753	1261
Fort Lewis.... Wash.	1722	1810	2009	302	444	1381	1895	1745	1033	1628	1783	1823	401	788
Frankfort ..... Kan.	1731	208	165	1665	1715	497	179	1753	1041	1638	95	137	1627	1134
Fremont ..... Neb.	1708	45	293	1643	1692	475	30	1731	1019	1615	108	72	1604	1111
Galeton ..... Colo.	1281	449	632	1221	1271	56	533	1309	597	1193	421	461	1193	689
Gardner Jct..... Ida.	916	1003	1202	648	697	574	1088	938	226	822	976	1016	609	116
Garfield ..... Utah	703	960	1159	807	856	531	1045	726	45	610	933	972	768	275
Garfield ..... Wash.	1591	1679	1878	264	107	1250	1764	1614	902	1497	1652	1691	214	657
Garland ..... Utah	790	949	1148	754	803	520	1034	818	106	703	922	961	715	222
Genoa ..... Neb.	1681	21	250	1618	1668	450	105	1706	994	1591	144	114	1580	1087
Goring ..... Neb.	1368	362	561	1303	1353	135	447	1391	679	1275	355	374	1265	771
Gibbon ..... Neb.	1571	92	290	1506	1556	338	176	1594	882	1479	64	104	1468	974
Gilmore Jct..... Neb.	1716	83	308	1680	1730	512	11	1768	1076	1652	208	87	1642	1149
Glencoe ..... Wyo.	949	812	1011	800	849	383	897	972	260	856	785	824	761	268
Glencoe Jct..... Wyo.	947	810	1009	798	847	381	895	970	258	854	783	822	759	266
Glendale ..... Cal.	72	1735	1934	1582	1632	1306	1820	63	778	168	1708	1748	1544	1050
Glendale Jct..... Cal.	66	1729	1928	1576	1626	1300	1814	57	772	159	1702	1742	1538	1044
Goshen Jct..... Ida.	925	1013	1211	657	706	583	1097	947	235	832	985	1025	618	125
Grace ..... Ida.	912	920	1119	689	739	491	1005	934	222	819	893	933	651	158

U. P. R. R. TARIFF No. 4000-A

SECTION A—DISTANCE IN MILES

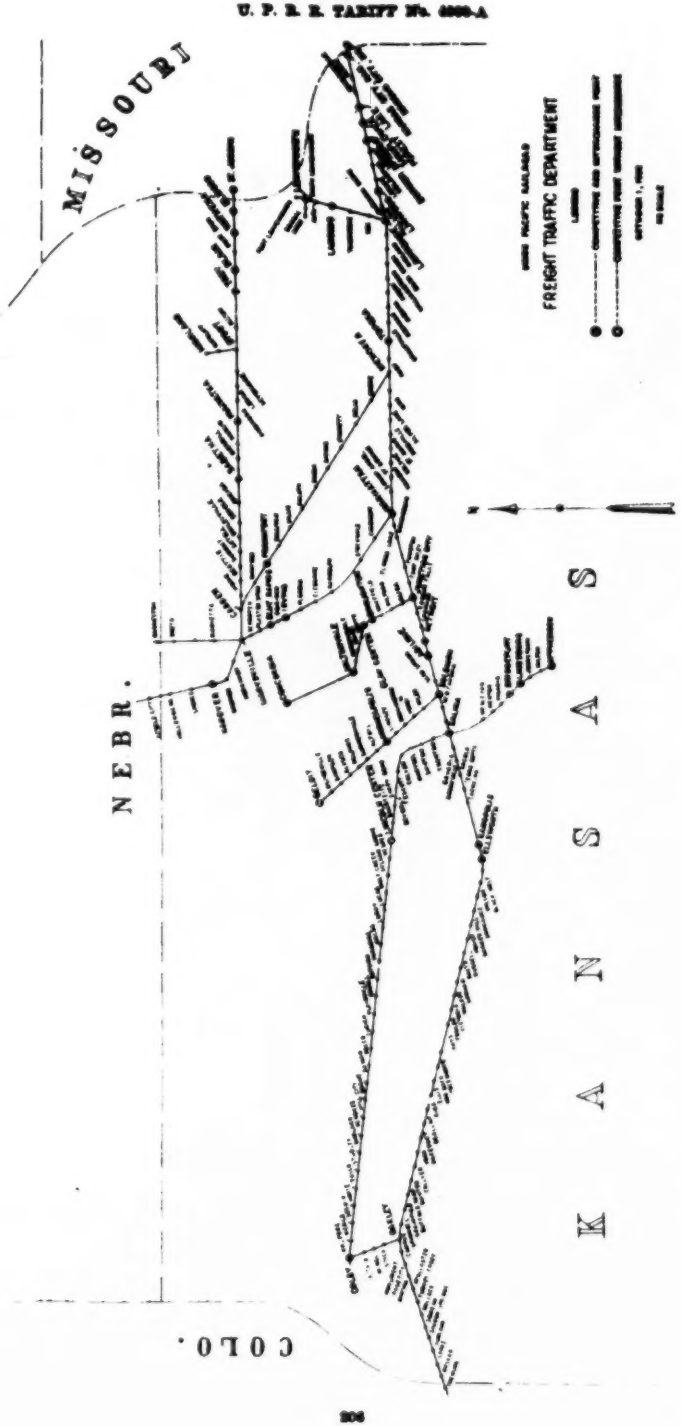
BETWEEN / AND	Colton, Cal.	Columbus, Neb.	Concordia, Kan.	Condon, Ore.	Connell, Wash.	Corlett Jct., Wyo.	Council Bluffs, Ia.	Cresmore, Cal.	Ogden, Utah	Daggett, Cal.	Davenport, Neb.	David City, Neb.	Dayton, Wash.	Declo, Ida.
Long Beach.....Cal.	84	1747	1945	1594	1642	1317	1831	74	780	177	1719	1759	1555	1062
Los Angeles.....Cal.	63	1726	1925	1573	1622	1296	1810	53	769	156	1699	1738	1534	1041
Los Angeles Harbor .....Cal.	91	1744	1942	1591	1640	1314	1828	71	786	174	1717	1756	1552	1059
Loup City.....Neb.	1661	123	347	1396	1446	438	208	1634	972	1568	122	136	1358	1064
Lund .....Utah	476	1187	1386	1036	1083	758	1272	499	230	383	1160	1199	995	502
Lyman .....Neb.	1346	384	583	1231	1321	113	469	1369	657	1253	357	396	1243	749
Lyndyl .....Utah	600	1063	1261	909	959	633	1147	623	105	507	1035	1075	871	378
McCall .....Ida.	1290	1348	1547	464	513	919	1433	1283	571	1167	1321	1360	425	326
McCammon .....Ida.	866	964	1153	644	693	524	1038	849	177	773	927	966	605	112
McPherson .....Kan.	1516	349	155	1761	1801	586	320	1839	1127	1723	236	278	1713	1319
Mackay .....Ida.	998	1088	1285	731	780	687	1171	1021	300	905	1059	1098	682	199
Malad .....Ida.	827	961	1179	725	835	551	1065	850	138	734	954	993	747	254
Malheur Jct.....Ore.	1172	1260	1458	338	388	830	1344	1194	482	1079	1232	1272	300	237
Mammoth .....Utah	636	1033	1232	880	929	604	1118	630	118	543	1006	1045	841	348
Mammoth Jct...Utah	634	1031	1230	878	927	602	1116	657	116	541	1004	1043	839	346
Manhattan .....Kan.	1709	246	93	1704	1753	536	217	1792	1079	1676	133	175	1665	1172
Marengo .....Wash.	1543	1631	1830	216	58	1201	1715	1586	854	1449	1604	1643	164	600
Marsing .....Ida.	1196	1284	1483	330	429	885	1368	1219	507	1103	1257	1297	541	282
Marysville .....Kan.	1714	191	148	1649	1698	480	162	1736	1024	1621	78	120	1610	1117
Mead Lake.....Nev.	334	1362	1561	1209	1258	933	1447	337	405	241	1256	1374	1170	677
Menoken .....Kan.	1789	286	140	1734	1774	536	238	1812	1100	1695	154	196	1686	1192
Midvale .....Utah	723	956	1154	803	852	526	1040	745	18	630	929	968	764	271
Midvale .....Wash.	1515	1601	1800	186	174	1173	1686	1536	824	1419	1574	1614	136	579
Milliken .....Colo.	1206	441	614	1230	1279	65	526	1318	605	1202	414	454	1191	698
Milton-Freewater ....Ore.	1423	1511	1709	139	155	1081	1595	1445	733	1329	1483	1523	49	488
Miltonvale .....Kan.	1841	318	21	1776	1825	606	290	1864	1152	1748	205	247	1737	1244
Mine No. 3.....Wyo.	956	818	1017	966	855	380	903	978	266	862	791	830	767	274
Minidoka .....Ida.	947	1035	1234	963	912	906	1120	970	258	854	1003	1047	824	31
Minneapolis ....Kan.	1819	323	120	1783	1803	589	294	1841	1129	1725	210	252	1715	1221
Moapa .....Nev.	318	1365	1544	1192	1242	916	1430	340	388	225	1318	1358	1154	660
Montesano ....Wash.	1733	1821	2020	313	456	1302	1906	1756	1044	1639	1794	1834	412	799
Moscow .....Ida.	1022	1050	1288	274	117	1260	1774	1025	912	1508	1663	1702	224	667
Mayer Jct.....Wyo.	943	805	1004	793	842	376	890	965	253	849	778	817	754	261
Murray .....Utah	726	962	1160	799	848	522	1036	749	22	633	925	964	760	267
Nampa .....Ida.	1131	1219	1418	378	428	790	1304	1154	442	1038	1192	1232	340	197
Nellis Air Field.Nev.	278	1338	1536	1234	1284	958	1472	301	430	185	1360	1400	1196	703
New Meadows...Ida.	1231	1363	1567	450	468	829	1463	1303	591	1187	1341	1381	370	346
Niscually .....Wash.	1719	1807	2006	290	441	1277	1891	1742	1029	1625	1780	1819	398	784
Norfolk .....Neb.	1713	50	289	1648	1698	420	128	1736	1024	1620	173	144	1610	1116
North Platte....Neb.	1463	200	398	1398	1448	230	284	1486	774	1370	172	212	1360	866
Northport .....Neb.	1400	330	529	1336	1384	167	615	1423	711	1307	303	343	1296	803
North Portland...Ore.	1606	1694	1892	185	327	1264	1778	1628	916	1512	1666	1706	284	671
North Salt Lake .....Utah	734	930	1128	796	806	510	1024	746	34	630	912	952	748	254
Nyssa .....Ore.	1163	1251	1450	347	398	822	1336	1186	474	1070	1224	1263	308	229
Oakesdale ....Wash.	1567	1675	1874	280	103	1346	1760	1610	896	1493	1648	1688	210	653
Oakley .....Ida.	991	1079	1277	588	638	649	1163	1013	301	898	1051	1091	550	31
Oakley .....Kan.	1590	804	318	1225	1576	380	476	1812	901	1497	891	433	1486	993
Oconee .....Neb.	1672	9	248	1607	1657	439	94	1695	983	1579	132	103	1569	1075
O'Fallons .....Neb.	1447	216	415	1382	1431	213	301	1469	757	1354	180	229	1343	850
Ogden .....Utah	755	956	1167	755	804	479	993	778	65	662	881	920	716	223
Ogden Sugar Works .....Utah	758	911	1110	758	807	482	996	781	68	665	884	923	719	226
Olympia .....Wash.	1710	1806	2005	295	438	1274	1888	1739	1026	1622	1777	1816	395	781
Omaha .....Neb.	1748	82	307	1679	1729	511	3	1787	1055	1652	205	86	1641	1148
Orchard .....Ida.	1008	1186	1384	412	461	756	1270	1121	408	1005	1159	1198	373	183
Ord .....Neb.	1602	132	348	1536	1646	428	208	1684	972	1568	122	136	1553	1064
Oregon Trunk Jct. .....Ore.	1506	1596	1794	87	230	1166	1680	1531	818	1414	1569	1608	187	573
Orvin .....Ida.	942	1030	1229	675	724	601	1115	965	253	849	1003	1043	636	143

SECTION A—DISTANCES IN MILES

Between and	Ogden, Utah	Granger, Wyo.	Green River, Wyo.	Rock Springs, Wyo.	Point of Rocks, Wyo.	Bridger, Wyo.	Carter, Wyo.	Fort Bridger, Wyo.	Evanston, Wyo.	Echo, Utah	Coalville, Utah	Wanship, Utah	Park City, Utah	Kimball, Idaho	Montpelier, Idaho	Border, Wyo.
Wye No. 2, Wyo.	12	219	399	561	484	582	625	691	739	494	473	396	1613			
Kimball, Ida.	889	1089	1116	1186	811	888	1022	818	1046	296	690	613	1230			
Montpelier, Ida.	970	164	78	243	1468	777	168	1139	171	1267	525	896	191			
Border, Wyo.	694	1247	1468	1268	841	813	1242	819	1286	289	1001	923	1540			
Hackamore, Wash.	1668	1868	1888	1964	806	1288	1886	1168	1838	1182	1476	1389	2016			
Kemmerer, Wyo.	854	1054	1171	1238	484	1187	1707	973	1701	1050	1345	1267	1886			
Mayer Jct., Wyo.	0	200	420	582	441	272	822	318	816	891	480	283	1009			
Midway, Utah	949	889	1083	1114	647	410	949	96	943	174	607	889	1147			
Montpelier, Ida.	488	1221	1200	1268	27	696	1226	888	1220	580	875	797	1414			
Mud Jct. Field, Wyo.	678	1229	1408	1469	888	854	1404	861	1388	841	1042	965	1583			
Mud Meadows, Ida.	872	1270	1469	1881	128	898	1286	881	1279	780	1024	946	1564			
Nicomile, Wash.	1511	1868	1888	1970	871	1274	1854	1088	1818	1167	1466	1385	2008			
North, Neb.	964	469	481	553	1297	673	217	1064	213	1162	515	478	385			
North Long Beach, Cal.	1697	1739	1819	1901	1294	1206	1786	718	1749	991	1393	1316	1933			
North Platte, Neb.	614	484	410	582	1047	483	216	884	211	912	365	228	894			
Northport, Neb.	851	891	841	488	824	889	847	771	841	848	255	185	825			
North Portland, Ore.	897	1486	1774	1886	486	1160	1719	976	1704	1064	1349	1271	1880			
North Salt Lake, Utah	228	941	1889	1198	435	486	986	94	950	178	594	517	1134			
Nyssa, Ore.	488	1288	1322	1414	43	718	1268	894	1262	612	906	829	1446			
Okanogan, Wash.	870	1077	1752	1858	488	1118	1888	987	1858	1056	1250	1253	1870			
Oakley, Ida.	883	1080	1109	1941	227	544	1086	861	1060	429	734	656	1274			
Oakley, Kan.	741	74	154	485	1174	549	347	961	353	1038	886	867	878			
Omaha, Neb.	883	439	849	813	1256	681	176	1043	171	1121	474	437	844			
O'Fallons, Neb.	899	806	487	879	1089	406	883	817	887	895	849	818	411			
Ogden, Utah	197	948	889	1071	484	876	886	188	919	903	563	486	1103			
Ogden Sugar Works, Utah	900	912	892	1074	487	878	888	188	922	906	566	480	1106			
Olympia, Wash.	1698	1898	1885	1906	888	1271	1881	1088	1815	1164	1459	1381	1999			
Omaha, Neb.	896	899	819	871	1298	705	198	1115	199	1193	546	509	803			
Orchard, Ida.	899	1187	1867	1848	61	988	1908	488	1197	546	841	763	1381			
Ord, Neb.	818	429	889	818	1845	680	188	1088	180	1110	448	486	844			
Oregon Trunk Jct., Ore.	800	1897	1877	1788	899	1068	1618	878	1607	956	1251	1178	1791			
Orvin, Ida.	884	1088	1111	1188	888	497	1047	818	1041	891	685	608	1225			
Ostrander, Wash.	941	1739	1818	1900	508	1804	1754	1020	1748	1006	1898	1815	1933			
Palisa, Utah	841	964	1083	1115	448	419	949	97	963	175	608	530	1147			
Park City, Utah	186	888	977	1059	478	845	913	198	907	871	888	474	1001			
Parkdale Jct., Colo.	498	889	429	827	900	877	481	888	475	765	50	95	658			
Pasadena, Cal.	1696	1739	1818	1900	1288	1204	1754	711	1748	991	1898	1815	1933			
Payette, Ida.	469	1267	1846	1428	80	782	1288	548	1276	626	980	848	1460			
Pendleton, Ore.	670	1477	1886	1688	240	948	1498	757	1486	836	1180	1058	1670			
Pendleton Jct., Ore.	678	1476	1885	1687	288	941	1491	756	1485	835	1189	1052	1669			
Peninsula Jct., Ore.	896	1698	1778	1856	456	1189	1709	974	1708	1052	1847	1270	1887			
Peterson, Ida.	210	1008	1087	1189	800	478	1088	280	1017	887	662	584	1202			
Pilot Rock, Ore.	697	1496	1874	1686	258	960	1518	775	1504	854	1148	1071	1688			
Pioche, Nev.	890	1208	1888	1464	797	789	1818	875	1818	255	957	879	1497			
Plainville, Kan.	888	184	141	188	1888	671	868	1088	268	1160	448	480	885			
Plummer, Ida.	969	1706	1786	1867	489	1178	1728	967	1716	1065	1860	1282	1900			
Pocatello, Ida.	181	978	1068	1139	870	444	998	259	988	887	632	554	1172			
Pomeroy, Wash.	886	1686	1715	1797	899	1101	1651	916	1645	995	1290	1212	1829			
Portland, Ore.	895	1683	1775	1854	456	1158	1708	974	1702	1052	1847	1269	1887			
Preston, Ida.	271	1069	1089	1170	406	475	1085	225	1019	803	668	585	1203			
Prince, Nev.	898	1311	1391	1473	906	777	1827	284	1321	863	965	888	1505			
Prince Jct., Nev.	890	1303	1382	1464	797	788	1818	275	1312	255	957	879	1496			
Prineville Jct., Ore.	931	1728	1808	1890	492	1194	1744	1009	1738	1087	1382	1305	1922			
Provo, Utah	880	998	1075	1154	487	459	1009	128	1003	188	647	569	1187			
Pullman, Colo.	480	885	415	639	918	288	498	700	487	778	66	107	634			
Puritan, Colo.	479	860	440	628	902	278	482	689	476	767	51	96	659			
Radiant, Wyo.	9	217	896	978	482	282	822	828	826	401	470	898	1010			
Rawlins, Wyo.	216	600	679	761	646	86	615	435	609	518	254	176	798			
Reliance Jct., Wyo.	102	724	804	886	534	190	746	821	734	890	878	801	918			
Reliance Mine, Wyo.	104	726	806	888	536	192	742	828	736	401	880	803	920			
Relief, Wash.	814	1611	1691	1773	874	1077	1627	892	1621	970	1265	1188	1805			
Richfield, Ida.	803	1101	1180	1262	177	566	1116	882	1110	460	755	677	1295			
Richland, Wash.	770	1567	1647	1728	880	1083	1582	848	1577	926	1221	1143	1761			
Richland Jct., Wash.	761	1558	1638	1719	821	1094	1573	839	1568	917	1212	1134	1752			
Rieth, Ore.	683	1480	1560	1642	244	946	1496	761	1490	839	1134	1057	1674			

*See Item 10.

U. P. R. R. TARIFF No. 6000-A
FREIGHT TRAFFIC DEPARTMENT
IOWA
NEBRASKA
KAN.
COLO.
WYO.


U. P. R. R. TARIFF No. 4000-A
MISSOURI
NEBR.
COLO.
KANSAS
FREIGHT TRAFFIC DEPARTMENT

[fol. 117]

U. P. R. R. PARENT No. 6010-A

NEBR.

KAN

WYO.

COLORADO

UNION PACIFIC RAILROAD

FREIGHT TRAFFIC DEPARTMENT

LEGEND

COMPETITIVE AND INTERCHANGE POINT

COMPETITIVE POINT WITHOUT INTERCHANGE

OCTOBER 1, 1912

IN SCALE

N

[fol. 118]

U. P. R. R. TARIFF No. 4000-A

IDAHO
NEVADA
UTAH
WYO.
N
MALAD
CACHE JCT.
BRADFORD
GARLAND
TREMONTON
THATCHER
BRIGHAM CITY
OGDEN
LAYTON
CLEARFIELD
SARFIELD
E. SARFIELD
MAGNA
SALT LAKE CITY
S. SALT LAKE
MURRAY
MIDVALE
SANDY
CUTLER
PROVO
IRONTON
GENEVA
LEHI
AMERICAN FORK
SPRINGVILLE
SANTAQUIN
MAMMOTH
SILVER CITY
LYNNDYL
FILLMORE
LUND
DESERET
IRON MOUNTAIN
IRON SPRINGS
CEDAR CITY
BEAR CITY
UNION PACIFIC RAILROAD
FREIGHT TRAFFIC DEPARTMENT
LEGEND
COMPETITIVE AND INTERCHANGE POINT
COMPETITIVE POINT WITHOUT INTERCHANGE
OCTOBER 1, 1952
NO SCALE

[fol 119]

[fol. 120]

SUBJECT TO INCREASES IN RATES AND CHARGES AS PROVIDED IN ITEMS X-175 AND X-196

G. H. Dumas I. C. C. No 34

For I. C. C., C. T. C. and State Commissions, See Page 2

CONSOLIDATED FREIGHT CLASSIFICATION 21

OFFICIAL CLASSIFICATION 65.
WESTERN CLASSIFICATION 76.

SOUTHERN CLASSIFICATION 64.
ILLINOIS CLASSIFICATION 29.

SECTION OF RATES, FS
AUG 24 1956 - 2 1957

RATINGS, RULES AND REGULATIONS

APPLICABLE TO

FREIGHT TRAFFIC COVERED BY TARIFFS GOVERNED BY THE OFFICIAL, SOUTHERN, WESTERN OR ILLINOIS CLASSIFICATION, AS SUCH TARIFFS MAY SPECIFY.

Concerning the correction of Fourth Section departures resulting from changes in this classification (or these classifications), see Rule 30, page 136 of Classification.

ISSUED AUGUST 1, 1956

EFFECTIVE OCTOBER 1, 1956

W. S. FLINT,
Agent for Rates in Official Classification
One Park Ave. at 32nd St.
NEW YORK (16), N. Y.

A. H. CARSON,
Alt. Agent for Rates in Southern Classification
161 Marietta Street,
ATLANTA (3), GA.

R. G. RAASCH,
Agent for Rates in Illinois Classification
500 Union Station,
CHICAGO (6), ILL.

GEO. H. DUMAS
Agent for Rates in Western Classification
500 Union Station,
CHICAGO (6), ILL.

CORRESPONDENCE
JUL 10 1957
CORRESPONDENCE
AUG 10 1956

CONSOLIDATED FREIGHT CLASSIFICATION 21

AGENT	I. C. C. No.	C. T. C. No.	STATE COMMISSION NOS. (Also Federal Maritime Board No.)
W. S. Flint	O. C. 64	O. C. 64	Ill. C. C.-O. C. 64; P. S. C.-Md.-O. C. 64; M. D. P. U.-O. C. 64; N. H.-P. S. C.-O. C. 64; P. U. C. N. J.-O. C. 64; P. S. C. N. Y.-O. C. 64; P. S. C.-N. Y.-M. T.- O. C. 8; Ohio-O. C. 64; Pa. P. U. C.-O. C. 64; R. I.-P. U. A.-O. C. 64; V. C. C.-O. C. 64; V.-P. S. C.-O. C. 64; F. M. B. 1.
A. H. Carson (Alt.)	113	S. C. 33	V. C. C.-S. C. 43; F. M. B. 1.
Geo. H. Dumas	34	W. C. 32	Ark. R. C.-W. C. 19; P. U. C. Colo.-W. C. 26; Ill. C. C.-W. C. 33; M. R. C.-W. C. 21; R. C. T.-W. C. 21; F. M. B. 1.
R. G. Rausch	[illegible]		Ill. C. C.-I. C. 434; F. M. B. 1.

CONSOLIDATED FREIGHT CLASSIFICATION 21

OFFICIAL CLASSIFICATION 65 — **SOUTHERN CLASSIFICATION 64**
WESTERN CLASSIFICATION 76 — **ILLINOIS CLASSIFICATION 33**

CANCELS

CONSOLIDATED FREIGHT CLASSIFICATION 20, Viz:

(Except portions under suspension)

OFFICIAL CLASSIFICATION 64 — **SOUTHERN CLASSIFICATION 63**
WESTERN CLASSIFICATION 75 — **ILLINOIS CLASSIFICATION 28**

AGENT		C. T. C. No.	STATE COMMISSION NOS.
W. S. Flint	I. C. C.-O. C. 64 I. C. C.-F. F.-O. C. 6 M. F.-I. C. C.-O. C. 11	O. C. 64	Conn. P. U. C.-M. F.-O. C. 11; Ill. C. C.-O. C. 64; I. R. C.-O. C. 64; K. R. C. 19; Me. P. U. C.-O. C. 64; P. S. C. Md.-O. C. 64; M. D. P. U.-O. C. 64; M. P. S. C.-O. C. 64; P. S. C. Mo.-O. C. 64; N. H.-P. S. C.-O. C. 64; P. U. C. N. J.-O. C. 64; P. S. C. N. Y.-O. C. 64; P. S. C.-N. Y.-M. T.-O. C. 7; Ohio-O. C. 64; Pa. P. U. C.-O. C. 64; R. I.-P. U. A.-O. C. 64; V. C. C.-O. C. 64; V.-P. S. C.-O. C. 64; P. S. C.-W. Va.-O. C. 64; S. B.-O. C. 18.
A. H. Carson (Alt.)	I. C. C. 109 I. C. C.-F. F.-S. C. 18 M. F.-I. C. C. 33	S. C. 31	A. P. S. C.-S. C. 19; K. R. C. 20; P. S. C. Mo.-S. C. 15; N. C. U. C.-S. C. 17; V. C. C.-S. C. 42.
Geo. H. Dumas	I. C. C. 33 I. C. C.-F. F.-W. C. 6 M. F.-I. C. C. 11	W. C. 31	Ark. R. C.-W. C. 18; Cal. P. U. C.-W. C. 8; P. U. C. Colo.-W. C. 24; P. U. C. Idaho-W. C. 23; Ill. C. C.-W. C. 22; Ia. R. C.-W. C. 16; K. C. C. Docket 4223-R; M. P. S. C.-W. C. 21; M. R. C.-W. C. 20; P. S. C. Mo.-W. C. 24; Mont. R. C.-W. C. 18; N. S. R. C.-W. C. 18; P. S. C. N.-W. C. 20; S. C. C. N. M.-W. C. 22; N. D. P. S. C.-W. C. 8; C. C. Okla.-W. C. 22; P. U. C. Ore.-W. C. 15; R. C. T.-W. C. 20; P. S. C. Utah-W. C. 21; Wn. T.-W. C. 16; P. S. C. Wyo.-W. C. 23; U. S. M. C. 4.
R. G. Rausch	I. C. C. 732 I. C. C.-F. F.-I. C. 13 M. F.-I. C. C. 79		I. C. C.-I. C. 373; I. R. C.-I. C. 196; P. S. C. Mo.-I. C. 91.

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Peoria Terminal Company.
Petaluma and Santa Rosa Railroad Company. (See Southern Pacific Lines.)
§Philadelphia, Bethlehem and New England Railroad Company.
Pickens Railroad Company.
Piedmont and Northern Railway Company.
The Pittsburg & Shawmut Railroad Company.
The Pittsburgh and Lake Erie Railroad Company.
The Pittsburgh & West Virginia Railway Company.
Pittsburgh, Chartiers & Youghiogheny Railway Company.
Point Comfort & Northern Railway Company.
Port Huron and Detroit Railroad Company.
Portland Terminal Company.
Portland Traction Company (Portland Railroad and Terminal Division).
Port Townsend Railroad.
§The Potomac Edison Company.
Prattsburgh Railway Corporation.
The Prescott and Northwestern Railroad Company.
Quanah, Acme & Pacific Railway Company.
Quebec Central Railway Company.
Quincy Railroad Company.
Rahway Valley Company (Rahway Valley Company, Lessee).
Raritan River Rail Road Company.
Reader Railroad.
Reading Company.
Richmond, Fredericksburg and Potomac Railroad Company.
§The Roberval and Saguenay Railway Company.
Rockdale, Sandow & Southern Railroad Company.
§Rockingham Railroad Company.
§Rosco, Snyder and Pacific Railway Company.
ΔRosslyn Connecting Railroad Company.
Rutland Railway Corporation.
§St. Francois County Railroad Company.
St. Johnsbury & Lamoille County Railroad.
St. Louis & Belleville Electric Railway Company.
§The St. Louis and O'Fallon Railway Company.
§St. Louis & Troy Railroad Company.
St. Louis, San Francisco and Texas Railway Company.
St. Louis-San Francisco Railway Company.
St. Louis Southwestern Railway Company.
§St. Marys Railroad Company.
Sacramento Northern Railway.
Δ§Salt Lake, Garfield and Western Railway Company.
Salado Motor Lines, Inc.
San Diego and Arizona Eastern Railway Company. (See Southern Pacific Lines.)
§The San Luis Central Railroad Company.
§San Manuel Arizona Railroad Company.
Sand Springs Railway Company.
Sandersville Railroad Company.
§Sanford and Eastern Railroad Corporation.
Santa Maria Valley Railroad Company.
Saratoga & Schuylerville Railroad Corporation.
Savannah & Atlanta Railway Company.
Seaboard Air Line Railroad Company.
Sierra Railroad Company.
Δ§Skaneateles Short Line Railroad Corporation.
Δ§Smoky Mountain Railroad (J. E. Temple, Receiver).
South Brooklyn Railway Company.
§South Buffalo Railway Company.
§Southern Indiana Railway, Inc.
Southern Iowa Railway Company
§Southern New York Railway, Incorporated.
Southern Pacific Company. (See Southern Pacific Lines.)
Southern Pacific Lines:
Salton Inter-Urban Railway Company.
Δ§Inter-California Railway Company.
Northwestern Pacific Railroad Company.
Pacific Electric Railway Company.
Δ§Petaluma and Santa Rosa Railroad Company.
San Diego & Arizona Eastern Railway Company.
Southern Pacific Company (Pacific Lines), (Denver, N. M., and west; Ogden, Utah, and west; Portland, Ore., and south).
Texas and New Orleans Railroad Company.
Δ§Tijuana and Tecate Railway Company.
§Visalia Electric Railroad Company.
Southern Railway Company. (See Southern Railway System.)
Southern Railway System:
The Alabama Great Southern Railroad Company.
Carolina and Northwestern Railway Company.
The Cincinnati, New Orleans and Texas Pacific Railway Company.
Georgia Southern and Florida Railway Company.
New Orleans and Northeastern Railroad Company.
Southern Railway Company.
Southern San Luis Valley Railroad Company.
The South Georgia Railway Company.
Spokane International Railroad Company.
Spokane, Portland and Seattle Railway Company.
§Springfield Terminal Railway Company (Vermont).
§State University Railroad Company.
The Staten Island Rapid Transit Railway Company.
§Steelton & Highspire Railroad Company.
ΔThe Stewartstown Railroad Company.
Stockton Terminal and Eastern Railroad.
§Sumpter Valley Railway Company.
§Sumter & Choctaw Railway Company.
§Sunset Railway Company.
ΔTalbotton Railroad Company.
§Tallulah Falls Railway Company (H. L. Brewer, Receiver).
§Tampa Southern Railroad Company.
Tavares and Gulf Railroad Company.
Tennessee, Alabama & Georgia Railway Company.
Tennessee Central Railway Company.
§Tennessee Railroad Company.
Terminal Railroad Association of St. Louis.
Texas and New Orleans Railroad Company. (See Southern Pacific Lines).
Texas and Northern Railway Company.
The Texas and Pacific Railway Company.
The Texas Mexican Railway Company.
Texas-New Mexico Railway Company.
§Texas, Oklahoma & Eastern Railroad Company.
§Texas Pacific-Missouri Pacific Terminal Railroad of New Orleans.
Texas Short Line Railway Company.
§Texas South-Eastern Railroad Company.
§The Thousand Islands Railway Company.
Tidewater Southern Railway Company.
Tijuana and Tecate Railway Company. (See Southern Pacific Lines.)
The Toledo and Eastern Railroad Company.
The Toledo, Angola & Western Railway Company.
Toledo, Peoria & Western Railroad Company.
The Toledo Terminal Railroad Company.
Tooele Valley Railway Company.
The Toronto, Hamilton and Buffalo Railway Company.
Tremont & Gulf Railway Company.
§Trenton-Princeton Traction Company.
Trona Railway Company.
Tucson, Cornelia and Gila Bend Railroad Company.
Tulsa-Sapulpa Union Railway Company.
The Tuskegee Railroad Company.
§Twin Branch Railroad Company.
§Unadilla Valley Railway Company.
§Union Freight Railroad Company (Boston, Mass.).
Union Pacific Railroad Company.
§Union Railroad Company.
Δ§Union Railroad of Oregon.
§Unity Railways Company.
§Upper Merion and Plymouth Railroad Company.
Utah Railway Company.

ΔFor explanation, see Section 10, Rule 34.
§For explanation, see Section 6, Rule 35.

Rule	SUBJECT	APPLICATION
	Articles Classified Subject or Not Subject to Uniform Bill of Lading Conditions	(a) Unless otherwise provided in this classification, when property is transported subject to the provisions of this classification, the acceptance and use are required, respectively, of Uniform Domestic Bill of Lading, "Straight" or "Order" (see pages 167 to 169, inclusive) or Uniform Export Bill of Lading "Straight" or "Order" (see pages 170 to 175, inclusive). (b) In order that consignor may have option of shipping property, either subject to the terms and conditions of Uniform Domestic Bill of Lading or Uniform Export Bill of Lading, as the case may be, hereinafter set forth, or under the liability imposed upon common carriers by common law and Federal and State statutes applicable thereto, this classification provides for different rates and for different forms of Bills of Lading to be used, respectively, as consignor may elect to have a limited liability or a common carrier's liability service. (c) Unless otherwise provided in this Classification, property will be carried at the reduced rate specified if shipped subject to all the terms and conditions of Uniform Domestic Bill of Lading (see pages 167 to 169, inclusive, of Classification), or Uniform Export Bill of Lading (see pages 170 to 175, inclusive, of Classification), as the case may be. If consignor elects not to accept all the terms and conditions of Uniform Domestic Bill of Lading or Uniform Export Bill of Lading, as the case may be, he should so notify agent of forwarding carrier at time his property is offered for shipment. If he does not give such notice, it will be understood that he desires his property carried subject to the terms and conditions of Uniform Domestic Bill of Lading or Uniform Export Bill of Lading, as the case may be, in order to secure the reduced rate. (d) Property carried not subject to all the terms and conditions of Uniform Domestic Bill of Lading or Uniform Export Bill of Lading, as the case may be, will be carried at carrier's liability, limited only as provided by common law and by the laws of the United States and of the several States in so far as they apply, but subject to the terms and conditions of Uniform Domestic Bill of Lading or Uniform Export Bill of Lading, as the case may be, in so far as they are not inconsistent with such common carrier's liability, and the rate charged therefor will be 10% higher (subject to a minimum increase of one cent per 100 lbs.) than the rate charged for property shipped subject to all the terms and conditions of Uniform Domestic Bill of Lading or Uniform Export Bill of Lading, as the case may be. (e) When consignor gives notice to agent of forwarding carrier that he elects not to accept all the terms and conditions of Uniform Domestic Bill of Lading or Uniform Export Bill of Lading, as the case may be, but desires a common carrier's liability service at the higher rate charged for that service, carrier must print, write or stamp upon Uniform Domestic Bill of Lading or Uniform Export Bill of Lading, as the case may be, a clause signed by the agent reading: "In consideration of the higher rate charged, the property herein described will be carried at the carrier's liability, limited only as provided by law; but subject to the terms and conditions of Uniform Domestic Bill of Lading or Uniform Export Bill of Lading, as the case may be, in so far as they are not inconsistent with such common carrier's liability." (ee) Shippers who print their own bills of lading may, at their option, instead of using the Uniform Straight Bill of Lading, print and use the Straight Bill of Lading—Short Form, set forth on page 169 herein, which by reference makes all the terms and conditions of the Uniform Straight Bill of Lading a part thereof in case of a rail or rail-water shipment, in which event the transportation of the shipment shall be subject to all the terms and conditions of the Uniform Straight Bill of Lading the same as if it had been executed instead of the Straight Bill of Lading—Short Form. **Insurance Against Marine Risks** (f) The cost of insurance against marine risk will not be assumed by carriers unless specifically provided for in tariffs.
2	Descriptions Should Conform to Classification Descriptions	Section 1. Descriptions of articles in shipping orders and bills of lading should conform to classification or tariff descriptions. When different ratings are provided for an article according to type of packing or package, the shipping conditions should be shown. Shipping orders and bills of lading for LCL shipments must specify number of articles, packages or pieces. If description provided in Bureau of Explosive Tariff, Agent H. A. Campbell's I. C. C. No. 9, differs from description contained in Classification, Exception or Commodity Tariff, Bureau of Explosives description on shipping orders and bills of lading must be shown first and other description immediately thereafter in parentheses. Section 2. Carriers reserve the right to inspect shipments where necessary to determine lawful ratings. When found to be incorrectly described freight charges must be collected according to proper description.
3	Property of Extraordinary Value Not Accepted	Unless otherwise provided in this Classification, the following property will not be accepted for shipment nor as premiums accompanying other articles: Bank bills, coin or currency; deeds, drafts, notes or valuable papers of any kind; jewelry including costume or novelty jewelry; postage stamps or letters and packets of letters with or without postage stamps affixed; precious metals or articles manufactured therefrom; precious stones; revenue stamps; antiques; or other related or unrelated old, rare, or precious articles of extraordinary value.
4	Freight Liable to Damage Other Freight or Equipment	Carriers are not obligated to receive freight liable to impregnate or otherwise damage equipment or other freight. Such freight may be accepted and receipted for "Subject to delay for suitable equipment," or may, for lack of suitable equipment, be refused.
5	Bases for Charges on Shipments Not Complying with Classification Requirements, and Miscellaneous Regulations	Section 1. (a) Articles tendered for transportation will be refused for shipment unless in such condition and so prepared for shipment as to render the transportation thereof reasonably safe and practicable. (b) Where packing specifications are not provided, articles will be accepted for transportation in any form of shipment other than in trunks, namely, "loose" or "in bulk" or "in packages" or "on skids." (c) When "in packages" is provided in connection with separate descriptions of articles, such articles will, except as specified in separate descriptions of articles, be accepted for transportation in any container other than trunks (whether or not constructed in accordance with the requirements of Rules 40 or 41), or in any shipping form other than "in bulk," "loose," "in tank cars" or "on skids other than lift truck skids," providing such container or form of shipment will render the transportation of the freight reasonably safe and practicable. (Rule 5 continued on next page)

CONSOLIDATED FREIGHT CLASSIFICATION 6

(Uniform Domestic Straight Bill of Lading, adopted by Carriers in Official, Southern, Western and Illinois Classification territories, March 15, 1922, as amended August 1, 1930, and June 15, 1931.)

UNIFORM STRAIGHT BILL OF LADING

Original—Not Negotiable

(To be Printed on "White" Paper)

Shipper's No.....

Agent's No.....

Company

RECEIVED, subject to the classifications and tariffs in effect on the date of the issue of this Bill of Lading,

at.....,19..

from.....

Consigned (described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined to the point of delivery (the said destination being understood to mean the place of delivery if such destination be on the railroad of the last carrier, or to the station at which such delivery is to be made otherwise than by railroad), which said carrier (the word carrier being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to the said place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination. It is agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and accepted for himself and his assigns.

(Mail or street address of consignee—For purposes of notification only.)

Consigned to.....

Destination.....State of.....County of.....

Route.....

Delivering Carrier.....Car Initial.....Car No.....

No. Packages	Description of Articles, Special Marks, and Exceptions	*Weight (Subject to Correction)	Class or Rate	Check Column

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is "carrier's or shipper's weight."

Note.—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding

.....per.....

Subject to Section 7 of conditions, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

.....
(Signature of consignor.)

If charges are to be prepaid, write or stamp here, "To be Prepaid."

.....

Received $.....
to apply in prepayment of the charges on the property described hereon.

.....
Agent or Cashier.

Per.....
(The signature here acknowledges only the amount prepaid.)

Charges advanced:

$.....

.....Shipper. .....Agent.

Per..... Per.....

Permanent postoffice address of shipper.....

CONTRACT TERMS AND CONDITIONS

Sec. 1. (a) The carrier or party in possession of any of the property herein described shall be liable as at common law for any loss thereof or damage thereto, except as hereinafter provided.

(b) No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, the authority of law, or the act or default of the shipper or owner, or for natural shrinkage. The carrier's liability shall be that of warehouseman, only, for loss, damage, or delay caused by fire occurring after the expiration of the free time allowed by tariffs lawfully on file (such free time to be computed as therein provided) after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination, or tender of delivery of the property to the party entitled to receive it, has been made. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon the request of the shipper, owner, or party entitled to make such request, or resulting from a defect or vice in the property, or for country damage to cotton, or from riots or strikes.

(c) In case of quarantine the property may be discharged at risk and expense of owners into quarantine depot or elsewhere, as required by quarantine regulations or authorities, or for the carrier's dispatch at nearest available point in carrier's judgment, and in any such case carrier's responsibility shall cease when property is so discharged, or property may be returned by carrier at owner's expense to shipping point, earning freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to property shall be borne by the owners of the property or be a lien thereon. The carrier shall not be liable for loss or damage occasioned by fumigation or disinfection or other acts required or done by quarantine regulations or authorities even though the same may have been done by carrier's officers, agents, or employees, nor for detention, loss, or damage of any kind occasioned by a quarantine or the enforcement thereof. No carrier shall be liable, except in case of negligence, for any mistake or inaccuracy in any information furnished by the carrier, its agents, or officers, as to quarantine laws or regulations. The shipper shall hold the carriers harmless from any expense they may incur, or damages they may be required to pay, by reason of the introduction of the property covered by this contract into any place against the quarantine laws or regulations in effect at such place.

Sec. 2. (a) No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch. Every carrier shall have the right in case of physical necessity to forward said property by any carrier or route between the point of shipment and the point of destination. In all cases not prohibited by law, where a lower value than actual va ue has been represented in writing by the shipper or has been agreed upon in writing as the released value of the property as determined by the classification or tariff upon which the rate is based, such lower value plus freight charges if paid shall be the maximum amount to be recovered, whether or not such loss or damage occurs from negligence.

(b) As a condition precedent to recovery, claims must be filed in writing with the receiving or delivering carrier, or carrier issuing this bill of lading, or carrier on whose line the loss, damage, injury or delay occurred, within nine months after delivery of the property (or, in case of export traffic, within nine months after delivery at port of export) or, in case of failure ,) make delivery, then within nine months after a reasonable time for delivery has elapsed; and suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid.

(c) Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance: Provided, That the carrier reimburse the claimant for the premium paid thereon.

Sec. 3. Except where such service is required as the result of carrier's negligence, all property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton or cotton linters is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and mixed with other grain of the same kind and grade without respect to ownership (and prompt notice thereof shall be given to the consignor), and if so delivered shall be subject to lien for elevator charges in addition to all other charges hereunder.

Sec. 4. (a) Property not removed by the party entitled to receive it within the free time allowed by tariffs, lawfully on file (such free time to be computed as therein provided), after notice of the arrival of the property at destination or at the port of export (if intended for export) has been duly sent or given, and after placement of the property for delivery at destination has been made, may be kept in vessel, car, depot, warehouse or place of delivery of the carrier, subject to the tariff charge for storage and to carrier's responsibility as warehouseman, only, or at the option of the carrier, may be removed to and stored in a public or licensed warehouse at the place of delivery or other available place, at the cost of the owner, and there held without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

(b) Where nonperishable property which has been transported to destination hereunder is refused by consignee or the party entitled to receive it, or said consignee or party entitled to receive it fails to receive it within 15 days after notice of arrival shall have been duly sent or given, the carrier may sell the same at public auction to the highest bidder, at such place as may be designated by the carrier: Provided, That the carrier shall have first mailed, sent, or given to the consignor notice that the property has been refused or remains unclaimed, as the case may be, and that it will be subject to sale under the terms of the bill of lading if disposition be not arranged for, and shall have published notice containing a description of the property, the name of the party to whom consigned, or, if shipped order notify, the name of the party to be notified, and the time and place of sale, once a week for two successive weeks, in a newspaper of general circulation at the place of sale or nearest place where such newspaper is published: Provided, That 30 days shall have elapsed before publication of notice of sale after said notice that the property was refused or remained unclaimed was mailed, sent, or given.

(c) Where perishable property which has been transported hereunder to destination is refused by consignee or party entitled to receive it, or said consignee or party entitled to receive it shall fail to receive it promptly, the carrier may, in its discretion, to prevent deterioration or further deterioration, sell the same to the best advantage at private or public sale: Provided, That if time serves for notification to the consignor or owner of the refusal of the property or the failure to receive it and request for disposition of the property, such notification shall be given, in such manner as the exercise of due diligence requires, before the property is sold.

(d) Where the procedure provided for in the two paragraphs last preceding is not possible, it is agreed that nothing contained in said paragraphs shall be construed to abridge the right of the carrier at its option to sell the property under such circumstances and in such manner as may be authorized by law.

(e) The proceeds of any sale made under this section shall be applied by the carrier to the payment of freight, demurrage, storage, and any other lawful charges and the expense of notice, advertisement, sale, and other necessary expense and of caring for and maintaining the property, if proper care of the same requires special expense, and should there be a balance it shall be paid to the owner of the property said hereunder.

(f) Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed freight agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and, except in case of carrier's negligence, when received from or delivered to such stations, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from locomotive or train or until loaded into and after unloaded from vessels.

Sec. 5. No carrier hereunder will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classifications or tariffs unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 6. Every party, whether principal or agent, shipping explosives or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for and indemnify the carrier against all loss or damage caused by such goods, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 7. The owner or consignee shall pay the freight and average, if any, and all other lawful charges accruing on said property; but, except in those instances where it may be lawfully be authorized to do so, no carrier by railroad shall deliver or relinquish possession at destination of the property covered by this bill of lading until all such freight and charges have been paid. The consignee (or owner, if consignee has no interest therein) shall be liable for all freight and other lawful charges, except that of the consignor stipulated by agreement, in the space provided for that purpose on the face of this bill of lading that the carrier shall not make delivery without requiring payment of such charges and the carrier, contrary to such stipulation, shall make delivery without requiring such payment, the consignor (except as hereinafter provided) shall not be liable for such charges: Provided, that, where the carrier has been instructed by the shipper or consignor to deliver said property to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of said property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has no beneficial title in said property, and (b) prior to delivery of said property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of said property; and, in such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges. If the consignee has given to the carrier erroneous information as to who the beneficial owner is, such consignee shall himself be liable for such additional charges. On shipments reconsigned or diverted by an agent who has furnished the carrier in the reconsignment or diversion order with a notice of agency and the proper name and address of the beneficial owner, and where such shipments are refused or abandoned at ultimate destination, the said beneficial owner shall be liable for all legally applicable charges in connection therewith. If the reconsignor or diverter has given to the carrier erroneous information as to who the beneficial owner is, such reconsignor or diverter shall himself be liable for all such charges.

If a shipper or consignor of a shipment of property (other than a prepaid shipment) is also the consignee named in the bill of lading and, prior to the time of delivery, notifies, in writing, a delivering carrier by railroad (a) to deliver such property at destination to another party, (b) that such party is the beneficial owner of such property, and (c) that delivery is to be made to such party only upon payment of all transportation charges in respect of the transportation of such property, and delivery is made by the carrier to such party without such payment, such shipper or consignor shall not be liable (as shipper, consignor, consignee, or otherwise) for such transportation charges but the party to whom delivery is so made shall in any event be liable for transportation charges billed against the property at the time of such delivery, and also for any additional charges which may be found to be due after delivery of the property, except that if such party prior to such delivery has notified in writing the delivering carrier that he is not the beneficial owner of the property, and has given in writing to such delivering carrier the name and address of such beneficial owner, such party shall not be liable for any additional charges which may be found to be due after delivery of the property, but if the party to whom delivery is made has given to the carrier erroneous information as to the beneficial owner, such party shall nevertheless be liable for such additional charges. If the shipper or consignor has given to the delivering carrier erroneous information as to who the beneficial owner is, such shipper or consignor shall himself be liable for such transportation charges, notwithstanding the foregoing provisions of this paragraph and irrespective of any provisions to the contrary in the bill of lading or in the contract of transportation under which the shipment was made. The term "delivering carrier" means the line-haul carrier making ultimate delivery.

Nothing herein shall limit the right of the carrier to require at time of shipment the prepayment or guarantee of the charges. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Where delivery is made by a common carrier by water the foregoing provisions of this section shall apply, except as may be inconsistent with Part III of the Interstate Commerce Act.

Sec. 8. If this bill of lading is issued on the order of the shipper, or his agent, in exchange or in substitution for another bill of lading, the shipper's signature to the prior bill of lading as to the statement of value or otherwise, or the absence of omission of such, shall be applicable in like manner to the bill of lading issued in exchange or substitution, and shall be deemed a part of this bill of lading as fully as if the same were written or made in or in connection with this bill of lading.

Sec. 9. (a) If all or any part of said property is carried by water over any part of said route and loss, damage or injury to said property occurs while the same is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water (this bill of lading being such bill of lading if the property is transported by such water carrier thereunder) and by and under the laws and regulations applicable to liability of carriers by water. Such water carriage shall be performed subject to all the terms and provisions of, and with all the exemptions from liability contained in the Act of Congress of the United States, approved on February 13, 1893, and entitled "An act relating to the navigation of vessels, etc.," and of other statutes of the United States amending carriers by water, the protection of limited liability, as well as the following subdivisions of this section; and to the conditions contained in this bill of lading not inconsistent with this section, when this bill of lading becomes the bill of lading of the carrier by water.

(b) No such carrier by water shall be liable for any loss or damage resulting from any fire happening to or on board the vessel, or from explosion, bursting of boilers or breakage of shafts, unless caused by the design or neglect of such carrier.

(c) If the owner shall have exercised due diligence in making the vessel in all respects seaworthy and properly manned, equipped, and supplied, no such carrier shall be liable for any loss or damage resulting from the perils of the lakes, seas, or other waters, or from latent defects in hull, machinery, or appurtenances, whether existing prior to, at the time of, or after sailing, or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And, when for any reason it is necessary, any vessel carrying any or all of the property herein described shall be at liberty to sail to any port or ports, in or out of the customary route, to tow and be towed, to transfer, transship, or lighter, to load and discharge goods at any time, to assist vessels in distress, to deviate for the purpose of saving life or property, and for docking and repairs. Except in case of negligence such carrier shall not be responsible for any loss or damage to property if it be necessary or is usual to carry the same upon deck.

(d) General Average shall be payable according to the York-Antwerp Rules of 1924, Sections 1 to 15, inclusive, and Sections 17 to 22, inclusive, and as to matters not covered thereby according to the laws and usages of the Port of New York. If the owners shall have exercised due diligence to make the vessel in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from faults or errors in navigation, or in the management of the vessel, or from any latent or other defects in the vessel, her machinery or appurtenances, or from unseaworthiness, whether existing at the time of shipment or at the beginning of the voyage (provided the latent or other defects or the unseaworthiness was not discoverable by the exercise of due diligence), the shippers, consignees and/or owners of the cargo shall nevertheless pay salvage and any special charges incurred in respect of the cargo, and shall contribute with the shipowner in general average to the payments of any sacrifices, losses or expenses of a general average nature that may be made or incurred for the common benefit or to relieve the adventures from any common peril.

(e) If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the tariff provisions, which shall be regarded as incorporated into the conditions of this bill of lading.

(f) The term "water carriage" in this section shall not be construed as including lighterage in or across rivers, harbors, or lakes, when performed by or on behalf of rail carriers.

Sec. 10. Any alteration, addition, or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be enforceable according to its original tenor.

STRAIGHT BILL OF LADING—SHORT FORM

ORIGINAL — NOT NEGOTIABLE
(To be printed on white paper)

Shipper's No.....

Carrier's No.....

(Name of Carrier)

RECEIVED, subject to the classifications and tariffs in effect on the date of the issue of this Bill of Lading,

At.....,19....

From.....

the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which said carrier (the word carrier being understood throughout this contract as meaning any person or corporation in possession of the property under the contract) agrees to carry to its usual place of delivery at said destination, if on its route, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the terms and conditions of the Uniform Domestic Straight Bill of Lading set forth (1) in Official, Southern, Western and Illinois Freight Classifications in effect on the date hereof, if this is a rail or a rail-water shipment, or (2) in the applicable motor carrier classification or tariff if this is a motor carrier shipment.

Shipper hereby certifies that he is familiar with all the terms and conditions of the said bill of lading, including those on the back thereof, set forth in the classification or tariff which governs the transportation of this shipment, and the said terms and conditions are hereby agreed to by the shipper and accepted for himself and his assigns.

Consigned to.....

(Mail or street address of consignee—For purposes of notification only)

Destination.....State.....County.....Delivery Address ☆.....

(☆To be filled in only when shipper desires and governing tariffs provide for delivery thereat.)

Route.....

Delivering Carrier.....Car or Vehicle Initials.....No.....

No. Packages	Kind of Package, Description of Articles, Special Marks, and Exceptions	*Weight (Subject to Correction)	Class or Rate	Check Column

Subject to Section 7 of Conditions of applicable bill of lading, if this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement:

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

.....
(Signature of consignor.)

If charges are to be prepaid, write or stamp here, "To be Prepaid."

.....

Received $.....
to apply in prepayment of the charges on the property described hereon.

.....
Agent or Cashier.

Per.....
(The signature here acknowledges only the amount prepaid.)

Charges advanced:

$.....

*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is carrier's or shipper's weight.

Note.—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding.....per.....

.....Shipper. .....Agent.

Per..... Per.....

Permanent postoffice address of shipper.....

112
[fol. 129]

40

ORIGINAL

APPOINTMENT OF AGENT

(TO BE FILED BY THE CARRIER WITH THE INTERSTATE COMMERCE COMMISSION)

FXI No. 106

Cancels FXI No. 101

UNION PACIFIC RAILROAD COMPANY
(Corporate Name of Carrier)

1416 Dodge Street, Omaha 2, Nebraska
(Post-Office address)

April 28, 1947

Know All Men by These Presents:

That the Union Pacific Railroad Company
(Corporate Name of Carrier)

has made, constituted, and appointed, and by these presents does make, constitute, and appoint Geo. H. Dumas its true and lawful attorney and agent for the said company, and in its name, place, and stead, to file the Western Classification and Supplements thereto, as required of common carriers by the Interstate Commerce Act, and by regulations established by the Interstate Commerce Commission thereunder, for the period of time, the traffic and the territory now herein named.

All freight traffic originating at, or destined to, points covered by tariffs which prescribe use of the Western Classification.
This appointment to remain in force until revoked.

MAY 19 1948

And the said Union Pacific Railroad Company
(Corporate Name of Carrier)

does hereby give and grant unto its said attorney and agent full power and authority to do and perform all and every act and thing above specified as fully, to all intents and purposes, as if the same were done and performed by the said company, hereby ratifying and confirming all that its said attorney and agent may lawfully do by virtue hereof, and assuming full responsibility for the acts and neglects of its said attorney and agent hereunder.

And further, That the Union Pacific Railroad Company
(Corporate Name of Carrier)

has made, constituted, and appointed, and by these presents does make, constitute, and appoint as alternate, J. P. Hackler, its true and lawful attorney and agent, for said company, and in its name, place, and stead, in case and only in case of the death or disability of the said Geo. H. Dumas, to do and perform the same acts and exercise the same authority as hereinabove granted to Geo. H. Dumas.

In witness whereof the said company has caused these presents to be signed in its name by its vice-president and to be duly attested under its corporate seal by its asst. secretary, at Omaha, in the State of Nebraska, on this 28th day of April, in the year of our Lord, nineteen hundred and forty-seven.

UNION PACIFIC RAILROAD COMPANY
(Corporate Name of Carrier)

By W. J. Tiet
Its Vice-President

C. B. Mountain
Asst. Secretary.

(Corporate Seal.)

[fol. 130] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

WESTERN DIVISION

Civil Action No. 1-299

UNITED STATES OF AMERICA, Plaintiff,

v.

UNION PACIFIC RAILROAD COMPANY, Defendant.

NOTICE OF MOTION FOR SUMMARY JUDGMENT—
Filed September 17, 1958

To: Walter R. Rouse, Esq.
Elmer B. Collins, Esq.
James B. Anderson, Esq.
1416 Dodge St.
Omaha 2, Nebr.
Addison C. Kistle, Esq.
414 Wickham Building
Council Bluffs, Iowa

SIRS:

Please take notice that upon the annexed affidavit of David M. Laird, Special Agent, Interstate Commerce Commission, duly sworn to on September 11, 1958, the affidavit of Harold D. McCoy, Secretary, Interstate Commerce Commission, duly sworn to on May 16, 1958, certified public documents and upon the pleadings herein, and all proceedings heretofore had herein, the undersigned will move this court, at Room of the United States Court House, Council Bluffs, Iowa, on the 6th day of October, 1958, at 10:00 o'clock in the forenoon or as soon thereafter as counsel can be heard for an order under Rule 56 of the Federal Rules of Civil Procedure for Summary Judgment in favor of the plaintiff upon all of the grounds as set [fol. 131] forth in the moving papers herein and for such

other relief as the court may deem just and proper in the premises.

Roy L. Stephenson, United States Attorney for the Southern District of Iowa; John C. Stevens, Assistant United States Attorney; Richard J. Wells, Assistant United States Attorney; Attorneys for the Plaintiff, 202 U. S. Court House, Des Moines, Iowa.

Dated September 17, 1958

Certificate of Service (omitted in printing).

[fol. 132] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

WESTERN DIVISION

[Title omitted]

MOTION IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, AND FOR SUMMARY JUDGMENT IN FAVOR OF DEFENDANT (F.R.C.P. 56)—Filed October 1, 1958

The defendant Union Pacific Railroad Company hereby moves the court to deny the motion of the plaintiff for summary judgment, heretofore filed herein, on the ground that there are material issues of fact to be decided by the court.

If, however, the court determines that there are no material issues of fact, then in that event the defendant moves the court to deny the motion of plaintiff for summary judgment and to enter summary judgment for the defendant, in accordance with the provisions of Rule 56 of the Rules of Civil Procedure, on the ground that the complaint of the plaintiff and the answer of the defendant on file herein, and the affidavits attached hereto marked Exhibits A-1 and A-2, show that defendant is entitled to judgment as a matter of law.

Walter R. Rouse, Elmer B. Collins, James H. Anderson, 1416 Dodge Street, Omaha 2, Nebraska, Addison C. Kistle, 414 Wickham Building, Council Bluffs, Iowa, Attorneys for Defendant.

[fol. 133]

EXHIBIT A-1 TO MOTION

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

WESTERN DIVISION

Civil Action No. 1-299

UNITED STATES OF AMERICA, Plaintiff,

v.

UNION PACIFIC RAILROAD COMPANY, Defendant.

AFFIDAVIT IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (F.R.C.P. Rule 56)

State of Nebraska)
) ss.
County of Douglas)

J. R. MacAnally, being first duly sworn, deposes and says:

1. Defendant, Union Pacific Railroad Company, is a corporation organized and existing under the laws of the State of Utah and having its principal place of business at Omaha, Nebraska.

2. That he is J. R. MacAnally, General Freight Traffic Manager, Union Pacific Railroad Company, 1416 Dodge Street, Omaha, Nebraska, and has personal knowledge of the facts herein set forth and makes this affidavit in opposition to plaintiff's motion for summary judgment heretofore filed herein and in support of defendant's motion for summary judgment also filed herein.

3. That defendant is a common carrier by railroad and, in conjunction with other common carriers by railroad, operates through routes and publishes and files with the Interstate Commerce Commission tariffs naming local and joint rates for the transportation of property in interstate and foreign commerce. Defendant operates nearly 10,000 miles of railroad between Seattle, Washington,

Ogden and Salt Lake City, Utah, and Los Angeles, California, through Wyoming, Colorado, Nebraska and Kansas to Council Bluffs, Iowa and Kansas City, Missouri. [fol. 134] Among the points to and from which said defendant transports property in interstate and foreign commerce is Council Bluffs, Iowa.

4. Under certain circumstances, for example, the unpredictable crop maturity of perishable food-stuffs, commercial marketing and distribution practices require a flexibility in train schedules and transit time utilized by shipments during transportation from place of production to place of consumption.

5. The use by shippers of circuitous routing in circumstances where necessary to obtain longer transit time is an established practice of long standing. To compete with longer routes for traffic requiring such longer transit time, the shorter route railroads must render a service slower than normally accorded traffic not requiring such service. Defendant, as one such shorter route railroad, has provided such slower service for at least the past 20 years, designating such service as "SMX", an abbreviation meaning "slow manifest service". During World War II, defendant suspended its "SMX" schedules.

6. In order to produce the vast quantity of lumber required during World War II, numerous small lumber mills commenced operation in the Northwest area of the United States, mainly in northern California, Oregon and Washington. These mills did not have any established commercial market, as their production was primarily for war requirements. To remain in business when the war demand ended it was necessary for these small mills to develop a method of merchandising adaptable to their operations, and the so-called "roller" method of lumber marketing resulted. In this type of marketing, a negotiable instrument covering the shipment is turned over to whole-[fol. 135] salers or brokers who endeavor to locate a purchaser while the shipment is moving eastward. When a sale is consummated the transfer to the buyer is accomplished through diversion or reconsignment instructions to the railroad while the shipment is en route.

7. Diversion or reconsignment is a well-established commercial practice of long standing and is fully authorized by railroad tariffs duly published and filed with the Interstate Commerce Commission.

8. Many thousands of carloads of lumber are produced and moved by railroad from the Northwest area described in paragraph 6 above. Most of this lumber moves to markets in the United States east of the Missouri and Mississippi Rivers over the lines and routes of several railroads which directly serve the Northwest area and which, with connecting lines, form numerous through routes with equal joint rates applicable thereto.

9. The routes so formed vary in length and some of them are much longer than others; some of the routes and the railroads participating therein between representative Northwest origins and Chicago, for example, being as follows:

[fol. 136]

Authorized Tariff Routes From Portland, Ore. to Chicago, Ill.

Route	Miles	Miles Longer than Un. Pac. direct route
Union Pacific Railroad Company to Council Bluffs, Iowa, thence Chicago, Milwaukee, St. Paul & Pacific Railroad Company (Union Pacific direct route)	2259	—
Southern Pacific Company to Ogden, Utah, Union Pacific Railroad Company to Council Bluffs, Iowa, thence Chicago, Milwaukee, St. Paul & Pacific Railroad Company	2584	325
Southern Pacific Company to Ogden, Utah, The Denver and Rio Grande Western Railroad Company via Pueblo, Colorado, to Denver, Colorado, thence Chicago, Burlington & Quincy Railroad Company	2907	648

Route	Miles	Miles Longer than Un. Pac. direct route
Southern Pacific Company to Tucumcari, New Mexico, thence Chicago, Rock Island & Pacific Railroad Company	3349	1090
Southern Pacific Company to El Paso, Texas, Texas & New Orleans Railroad Company to Corsicana, Texas, St. Louis South Western Railway Company to East St. Louis, Illinois, thence Wabash Railroad Company	3823	1564
From Eugene, Ore. to Chicago, Ill.		
Southern Pacific Company to Ogden, Utah, Union Pacific Railroad Company to Council Bluffs, Iowa, thence Chicago, Milwaukee, St. Paul & Pacific Railroad Company (Union Pacific direct route)	2456	—
Southern Pacific Company to Ogden, Utah, The Denver and Rio Grande Western Railroad Company via Pueblo, Colorado, to Denver, Colorado, thence Chicago, Burlington & Quincy Railroad Company	2779	323
Southern Pacific Company to Tucumcari, New Mexico, thence Chicago, Rock Island & Pacific Railroad Company	3225	769
Southern Pacific Company to El Paso, Texas, Texas & New Orleans Railroad Company to Corsicana, Texas, St. Louis South Western Railway Company to East St. Louis, Illinois, thence Wabash Railroad Company (Exhibit 1)	3699	1243

[fol. 137]

From Grants Pass, Ore. to Chicago, Ill.

Route	Miles	Miles Longer than Un. Pac. direct route
Southern Pacific Company to Ogden, Utah, Union Pacific Railroad Company to Council Bluffs, Iowa, thence Chicago, Milwaukee, St. Paul & Pacific Railroad Company (Union Pacific direct route)	2476	—
Southern Pacific Company to Ogden, Utah, The Denver and Rio Grande Western Railroad Company via Pueblo, Colorado, to Denver, Colorado, thence Chicago, Burlington & Quincy Railroad Company	2799	323
Southern Pacific Company to Tucumcari, New Mexico, thence Chicago, Rock Island & Pacific Railroad Company	3081	605
Southern Pacific Company to El Paso, Texas, Texas & New Orleans Railroad Company to Corsicana, Texas, St. Louis South Western Railway Company to East St. Louis, Illinois, thence Wabash Railroad Company	3551	1075

From Medford, Ore. to Joliet, Ill.

Southern Pacific Company to Ogden, Utah, Union Pacific Railroad Company to Council Bluffs, Iowa, Chicago and North Western Railway Company to West Chicago, Illinois, Elgin, Joliet and Eastern Railway Company to Joliet, Illinois (Union Pacific direct route)	2445.1	—

Route	Miles	Miles Longer than Un. Pac. direct route
Southern Pacific Company to Ogden, Utah, Union Pacific Railroad Company to Denver, Colorado, The Atchison, Topeka and Santa Fe Railway Company to Snyder, Texas, Roscoe, Snyder and Pacific Railway Company to Roscoe, Texas, The Texas and Pacific Railway Company to Sweetwater, Texas, Gulf, Colorado and Santa Fe Railway Company to Cleveland, Texas, Texas and New Orleans Railroad Company to Shreveport, Louisiana, Kansas City Southern Lines to Kansas City, Missouri, Union Pacific Railroad Company to Council Bluffs, Iowa, Chicago, Milwaukee, St. Paul and Pacific Railroad to Elgin, Illinois, Chicago, Aurora and Elgin Railway Company to Electric Junction, Illinois, Elgin, Joliet and Eastern Railway Company to Joliet, Illinois	4193.5	1748.4

[fol. 138]

From Smith Flat, Calif. to Chicago, Ill.

Camino, Placerville & Lake Tahoe Railroad to Placerville, California, Southern Pacific Company to Ogden, Utah, Union Pacific Railroad Company to Council Bluffs, Iowa, Chicago, Burlington & Quincy Railroad to Chicago, Illinois (Union Pacific direct route)	2232.5	—
Camino, Placerville & Lake Tahoe Railroad to Placerville, California, Southern Pacific Company to Ogden, Utah, Union Pacific Railroad Company to Denver, Colorado, The Atchison, Topeka and Santa Fe		

Route	Miles	Miles Longer than Un. Pac. direct route
Railway Company to Snyder, Texas, Roscoe, Snyder and Pacific Railway Company to Roscoe, Texas, The Texas and Pacific Railway Company to Sweetwater, Texas, Panhandle and Santa Fe Railway Company to Houston, Texas, Texas and New Orleans Railroad Company to Dallas, Texas, St. Louis, San Francisco and Texas Railway Company to Sherman, Texas, St. Louis-San Francisco Railway Company to Kansas City, Missouri, Union Pacific Railroad Company to Council Bluffs, Iowa, Chicago and North Western Railway Company to Chicago (Exhibit 2)	4083.6	1851.1

10. The difference in distances via Union Pacific direct routes and the longer, circuitous routes is graphically illustrated by two maps attached hereto and made parts of this affidavit as Exhibits 1 and 2, which show Union Pacific direct routes in red lines, and two of the longer, circuitous routes in black lines, between Eugene, Oregon and Smith Flat, California, respectively, and Chicago, Illinois.

11. Freight rates and charges for transporting lumber from the Northwest and the privilege of reconsigning or [fol. 139] diverting while in transit are the same over all the routes just described and numerous other routes to any particular eastern destination, but the time utilized in transit by the longer routes is proportionately greater than via Union Pacific direct routes.

12. When shipments of "roller" lumber traffic, such as described in paragraph 6 above, are originated, shippers route them over the longer or more circuitous routes requiring more time in transit, which will permit them to find buyers while the shipments are moving eastward; and,

in such circumstances, the lumber traffic is lost by the shorter routes, including this defendant's route, because of the longer time in transit utilized by the longer routes.

13. Establishment and maintenance at the same tariff rates, fares and charges, by defendant and other railroads of fast, slow or different speeds of freight and passenger train schedules and services, adjusted for competition between competing lines and routes of railroad, and to the marketing and distribution needs of patrons, is a practice that has long prevailed in competitive railroad transportation operations in the United States.

14. Being a participant in the shorter and faster routes to the east which were losing traffic requiring slow service and particularly the "roller" lumber traffic, to the longer and slower routes, defendant, in an effort to compete for the traffic, lengthened or increased the transit time over its direct routes. This was publicized by issuance of "Circular No. 263," dated September 22, 1949, reestablishing "SMX" schedules September 21st, 1949 for the movement of "both perishable and dead freight," including lumber and all other traffic of any shipper requiring slower than normal [fol. 140] service. A complete and exact copy of said Circular No. 263 is attached hereto and made a part of this affidavit as Exhibit 3.

15. In "SMX" service, shipments are moved from division or sub-division terminals to the next sub-division or division terminal in local or "drag" trains regularly operated in the normal process of moving the available traffic, rather than in "through" trains. The schedule in "SMX" service between Ogden, Utah and Council Bluffs, Iowa, for example, was 9 days.

16. Because of an acute car shortage then prevailing and in an effort to assist in obtaining greater utilization of the car supply then available, defendant voluntarily suspended its "SMX" schedules effective 11:59 PM, July 31, 1950.

17. During the ensuing fourteen months shippers increasingly routed their traffic via the longer and slower routes, thus depriving defendant of participation in such

traffic. In a further, and modified, effort again to compete with the longer routes, defendant on October 2, 1951 undertook to handle over a parallel line of its railroad via Ellis, Kansas, traffic so routed by shippers, which routing, being somewhat longer than its main line, would require two additional days over normal schedule when interchanged to connecting carriers at Kansas City, Missouri, or three additional days over normal schedule when interchanged to connecting carriers at Council Bluffs, Iowa. This was publicized by issuance of "Circular No. 205," dated October 2, 1951, and "Circular No. 208," dated October 8, 1951, of which exact copies are attached hereto and made parts of this affidavit as Exhibits 4 and 5, respectively. The routing via Ellis was available for all commodities, except in a few instances where rates or routing were restricted by tariffs. (See message dated "OMA DEC 6 1951" to "FBS —Cinti" from "J R M", copy of which is attached hereto and made a part of this affidavit as Exhibit 6).

[fol. 141] 18. Train operations over defendant's main line are more economical than over the longer route via Ellis, Kansas, and, in order to effect economies in operation, the actual physical handling via Ellis, Kansas, of traffic so routed was discontinued on December 12, 1953, and a so-called "lumber special" service was inaugurated for main-line operation in which lumber and all other commodities requiring slow service were assembled into trains and moved from terminal to terminal in much the same manner as "SMX" service had formerly been operated, but on a schedule comparable to that which had been obtained during the physical movement via Ellis. Use of "via Ellis" routing on bills of lading was continued by shippers to designate traffic on which they desired slow service.

19. Substantial loss of traffic by defendant to longer and slower competing routes continued, and to again attempt to meet this competitive situation, defendant changed its so-called "lumber special" schedule on January 6, 1954 to 12 days, Ogden to Council Bluffs. Since that schedule too was still too fast to compete effectively with the longer routes, defendant, on February 15, 1954, changed its schedule to 14 days.

20. On March 19, 1956, the Interstate Commerce Commission issued its Service Order No. 910, to become effective 12:01 AM, April 9, 1956, copy of which is attached hereto and made a part of this affidavit as Exhibit 7. This Service Order prohibited railroads from willfully delaying "the movement of loaded freight cars by holding such cars in yards, terminals, or sidings for the purpose of increasing the time in transit of such loaded cars"; prohibited setting out loaded cars between terminals except in cases of emergencies or sound operating requirements; prohibited backhauling loaded cars for the purpose of increasing the time in transit; and prohibited the use of any route other than its usual and customary fast freight route from point [fol. 142] of receipt of the car from consignor or connecting railroad carrier to point of delivery to consignee or connecting carrier. The operation of all rules and regulations (such as tariff rules and regulations) in conflict with Service Order No. 910, was suspended.

21. In Civil No. 8541, the United States District Court for the District of Oregon issued a Temporary Restraining Order at 4:40 PM, April 7, 1956, enjoining the enforcement of Service Order No. 910 pending hearing and determination by a full three-judge Court on a complaint by shippers for an interlocutory injunction. In Memorandum Opinion dated May 31, 1956, the full Court dismissed the complaint and vacated the temporary restraining order. The Interstate Commerce Commission subsequently released at 4:00 PM, June 13, 1956, a notice that Service Order No. 910 would be enforced on and after that date.

22. With the effectiveness of Service Order No. 910 reinstated on June 13, 1956, defendant completely discontinued any slow service whatsoever and abandoned the "via Ellis" routing arrangement.

23. On July 2, 1956, a letter by the Director, Bureau of Safety and Service, Interstate Commerce Commission, announced an interpretation that "Service Order No. 910 does not prohibit railroads from accepting shipments which are routed under present applicable tariff routes." This letter, copy of which is attached hereto and made a part

of this affidavit as Exhibit 8, specifically approved the use by certain railroads of alternate interior or parallel routes over their individual railroad, and, as such, constituted a modification of the prohibition in Service Order No. 910 itself against the use of "any route other than its usual and customary fast freight route" and the suspension of tariff provisions so providing, as mentioned in paragraph 20 above.

[fol. 143] 24. By letter dated July 24, 1956, to which were attached Exhibits A to F, inclusive, and which letter and exhibits are attached hereto and made a part of this affidavit as Exhibit 9, defendant advised the Chairman of the Interstate Commerce Commission that during the first month in which Service Order No. 910 was operative, estimates indicated defendant had been deprived of participation in a minimum of 1,542 carloads which it would normally have handled and on which its revenue, based on the then-prevailing average revenue per car handled, was calculated at approximately $506,000 for the one month. In said letter defendant presented information showing the renewed use by shippers of longer circuitous routes to accomplish longer transit time, and information was requested concerning action the Interstate Commerce Commission would take to correct this adverse condition against defendant which continued enforcement of Service Order No. 910 created.

25. Response by the Chairman of the Interstate Commerce Commission, in a letter dated July 30, 1956, copy of which is attached hereto and made a part of this affidavit as Exhibit 10, stated Service Order No. 910 was intended to eliminate the use of freight cars as storage during the then car shortage; reaffirmed that the Order did not prohibit railroads from accepting shipments which were routed under then applicable tariff routes; expressed the view that if the Order created a condition discriminatory against defendant it was due to defendant's practice of allowing certain shippers concessions in the matter of storage in transit not accorded to all shippers; advised that the Commission was having field checks made to see that Service Order No. 910 was complied with and that lumber ship-

ments were being handled strictly in accordance with tariff routings and charges; and that any violations of the Order or failure to assess proper charges would be handled for prosecution.

[fol. 144] 26. Upon receiving this response, defendant concluded that its tariff publications did authorize the use of alternate interior or parallel routes over its line of railroad, such as were excepted from Service Order No. 910 by the letters of July 2, 1956, mentioned in paragraph 23 above, and of July 30, 1956, mentioned in paragraph 25 above, and it advised shippers desiring slow service that shipments routed by them over Union Pacific via Colby, Kansas, would be physically handled by defendant via Colby, Kansas, on a schedule, Ogden to Council Bluffs, ranging from six to eight days.

27. When Service Order No. 910 was vacated by the Interstate Commerce Commission effective 12:01 AM, December 8, 1956, defendant reinstated its fourteen-day service, as described in paragraphs 18 and 19 above, via its main line, Ogden to Council Bluffs, such as had been in effect prior to Service Order No. 910. Use of "via Colby" routing on bills of lading was continued by shippers to designate traffic on which slow service was required. This was accomplished by telegram, dated December 7, 1956, to defendant's traffic representatives throughout the country. Copy of said telegram is attached hereto and made a part of this affidavit as Exhibit 11.

28. Defendant, in conjunction with other railroad common carriers, has filed and published at all times mentioned herein and now files and publishes with the Interstate Commerce Commission, as required by law, tariffs of rates and charges, rules and regulations governing the line haul transportation service and accessorial services, including diversion, reconsignment, and demurrage, applicable to lumber and other commodities in carload lots transported from points in Oregon, Washington and other Western states. Said tariffs do not specify or provide for or offer the performance of fast, expedited, slowed or delayed trans-

[fol. 145] portation service, or any schedule or "running time" for performance of any transportation service, or the transportation of lumber or any other property by any particular train or in time for any particular market; and said tariffs do not publish or provide for any greater or lesser or additional or any different freight charges for transporting one shipment faster or slower than another shipment.

29. Defendant has transported and now transports lumber and other commodities in slower train schedules and movement than its fastest possible train schedules or running time, for any shippers of lumber or any other commodity indicating a desire for such slower service; such shipments being transported in freight cars furnished such shippers at regular tariff rates published and charged for transporting such shipments, and no extra or special charge, in addition to the rates and charges for the transportation of such shipments as published in defendant's tariffs filed with the Interstate Commerce Commission, was or is published or collected for either the slower movement of such shipments or for the use of the cars in which they are hauled, or for the trackage and other facilities used in hauling such cars.

30. Defendant has made and does make available the performance of the slower freight service for all shippers desiring such service, including shippers of lumber, fruits and vegetables and other commodities, and defendant has not withheld from any shippers the privilege of availing themselves of such slow service; that defendant has not selected or acted secretly with any particular shippers in offering and performing such slower service; or withheld from any shipper the privilege of equally availing itself of such slow service or the use of freight cars, trackage and other facilities for such slow service and has not performed any service or afforded any facility for any shippers at less or different compensation than the regularly published tariff rates applicable via its line and [fol. 146] applicable and available to the same shippers for

the same or greater service and facilities via the longer circuitous routes described in paragraph 9 above.

Further affiant sayeth not.

/s/ J. R. MacAnally
Affiant

Subscribed and sworn to before me this 26th day of September, 1958.

(Seal) /s/ Louis Scholnick
Notary Public

[fol. 147] Exhibits

The exhibits mentioned in and made parts of the foregoing Affidavit are as follows:

Exhibit 1—Map showing Union Pacific direct route in red and one of the longer circuitous routes in black between Eugene, Oregon and Chicago, Ill.

Exhibit 2—Map showing Union Pacific direct route in red and one of the longer circuitous routes in black between Smith Flat, Calif. and Chicago, Ill.

Exhibit 3—"Circular No. 263" dated September 22, 1959 (6 pages), publicizing reestablishment of "SMX" service on perishable and dead freight via Union Pacific main line.

Exhibit 4—"Circular No. 205" dated October 2, 1951 (1 page), publicizing routing via Ellis, Kansas.

Exhibit 5—"Circular No. 208" dated October 8, 1951 (1 page), supplementing Circular No. 205.

Exhibit 6—Message dated December 6, 1951 (1 page) to "FBS—Cinti" from "J R M", advising that Ellis routing was available for any traffic if rates applied and if there were no tariff restrictions against such routing.

Exhibit 7—Service Order No. 910 of Interstate Commerce Commission dated March 19, 1956 (2 pages).

EXHIBIT 8—Letter dated July 2, 1956 (1 page) to Mr. A. H. Gass from Mr. C. W. Taylor, Director, Bureau of Safety and Service, Interstate Commerce Commission, advising that Service Order No. 910 "does not prohibit railroads from accepting shipments which are routed under present applicable tariff routes."

EXHIBIT 9—Letter dated July 24, 1956 (9 pages), including "Exhibits A through F", inclusive, thereto, to Honorable Owen Clarke, Commissioner, Interstate Commerce Commission, from Mr. W. T. Burns (Vice President —Traffic), Union Pacific Railroad Company, concerning the latter's traffic losses resulting from Service Order No. 910.

EXHIBIT 10—Letter dated July 30, 1956 (2 pages), to Mr. W. T. Burns, Vice President—Traffic, Union Pacific Railroad Company, from Commissioner Owen Clarke of the Interstate Commerce Commission, stating that "Service Order No. 910 does not prohibit railroads from accepting shipments which are routed under present applicable tariff routes", and advising that violations of that order would be handled for prosecution.

EXHIBIT 11—Telegram dated December 7, 1956 (1 page), to traffic representatives of Union Pacific Railroad Company from "J R M", advising that "Service Order 910 being vacated midnight tonight" and that routing via Colby, instead of Ellis, Kansas, was reinstated, with traffic to move via main line in special service on 14-day schedule Ogden to Council Bluffs.

[fol. 148]

EXHIBIT 1 TO AFFIDAVIT

(See Opposite) ☞

MAP IS TOO LARGE TO BE FILMED.

[fol. 149]

EXHIBIT 2 TO AFFIDAVIT

(See Opposite) ☞

MAP IS TOO LARGE TO BE FILMED.

[fol. 150]

EXHIBIT 3 TO AFFIDAVIT

(Page 1 of 6 Pages)

UNION PACIFIC RAILROAD COMPANY

Department of Traffic

CIRCULAR No. 263

Omaha—September 22, 1949

File: B-95-540-11

AIRMAIL

ALL FREIGHT TRAFFIC OFFICERS,
GENERAL AGENTS AND
FREIGHT TRAFFIC REPRESENTATIVES:

It has been decided to reestablish SMX service and complete details of the new operation are contained in Mr. Hanson's mailgram of September 21st, with accompanying schedule, copies attached.

You should carefully familiarize yourselves with the manner in which this will be handled. Particular attention is directed to requirement that Traffic Department representatives receiving requests for SMX service obtain written confirmation from the shipper or consignee which should be held in your file for use in event claims ultimately develop by reason of slow service.

The SMX schedules will apply on both perishable and dead freight. If Southern Pacific and Western Pacific join from Central California we should then have a uniform 17th day arrival Chicago on slow schedule from all principal coast origin territories.

Inauguration of similar SMX schedules westbound is receiving attention and later advice will be promulgated.

J. R. MACANALLY

[fol. 151]

(Page 2 of 6 pages)

MAILGRAM

Omaha, September 21, 1949

Mr. H. E. Shumway,
Omaha
Mr. F. C. Paulsen,
Salt Lake
Mr. L. A. Collins,
Portland
Mr. V. W. Smith,
Cheyenne
Mr. E. Hicks,
Portland
Mr. J. E. Mulick,
Omaha
Mr. W. O. Horne,
Kansas City

Mr. E. H. Bailey,
Cheyenne
Mr. G. A. Cunningham,
Salt Lake
Mr. D. F. Wengert,
Los Angeles
Mr. A. Bybee,
Pocatello
Mr. A. McAllister,
Albino
Mr. R. E. Edens,
Ogden

(CC Mr. P. J. Lynch,
Omaha
Mr. W. T. Burns,
Omaha
Mr. J. R. MacAnally,
Omaha
Mr. O. J. Wullstein,
Omaha
Mr. O. I. Larsen,
Omaha
Mr. A. A. Haussener,
CoBluffs
Mr. W. M. Calhoun,
CoBluffs
Mr. T. P. Argubright,
KCity
Mr. R. V. Tye,
Kansas City
Mr. D. Gresham,
Kansas City
Mr. J. J. Phelan,
Kansas City
Mr. E. C. Kauffman,
Marysville

Mr. P. D. Self,
Laramie
Mr. J. J. Theisen,
Laramie
Mr. C. B. Lisher,
Rawlins
Mr. F. E. Terwilleger,
GrRiver
Mr. W. S. Whittaker,
Gr River
Mr. E. F. Bergonzo,
Gr River
Mr. O. A. Durrant,
Ogden
Mr. W. H. Powers,
Pocatello
Mr. C. D. Waring,
Pocatello
Mr. L. E. Mangum,
Nampa
Mr. R. T. Petty,
Nampa
Mr. C. H. Burnett,
La Grande

Mr. C. A. Laughlin, Omaha
Mr. A. A. Andersen, Omaha
Mr. C. B. Hurd, Grand Island
Mr. A. E. Hackman, Grand Isld.
Mr. E. M. Quick, Grand Island
Mr. J. E. Guynan, No. Platte
Mr. E. F. Dearden, North Platte
Mr. W. D. Deakins, No. Platte
Mr. W. E. Henke, No. Platte
Mr. G. O. Sizemore, NoPlatte
Mr. D. L. Keeney, No. Platte
Mr. C. T. Alford, Denver
Mr. C. E. Breternitz, Denver
Mr. C. A. Vick Roy, Denver
Mr. P. Melody, Denver
Mr. R. H. Kelley, Denver
Mr. E. F. Boyle, Cheyenne
Mr. J. M. Kelley, Cheyenne
Mr. K. I. Jones, Cheyenne
Mr. D. H. Shotliff, Cheyenne
Mr. C. J. Colombo, Laramie
Mr. B. B. Johnson, La Grande
Mr. H. A. Achenbach, Spokane
Mr. P. H. Walsh, Spokane
Mr. J. G. Kimmell, Albina
Mr. R. L. Rickard, Albina
Mr. L. L. Rudd, Albina
Mr. H. M. Turner, Portland
Mr. R. W. Taylor, Portland
Mr. P. G. Rodby, Portland
Mr. A. K. McNeill, Salt Lake
Mr. A. E. Strand, Salt Lake
Mr. C. C. Larkin, Salt Lake
Mr. D. Durham, Salt Lake
Mr. J. W. Tuckfield, Salt Lake
Mr. W. B. Groome, Las Vegas
Mr. R. A. Forbes, Las Vegas
Mr. J. B. Crowder, Las Vegas
Mr. F. H. Blair, San Bernardino
Mr. E. J. Hilton, Los Angeles
Mr. L. W. Flaherty, Los Angeles
Mr. R. C. Jones, Los Angeles
Mr. R. C. Stewart, Los Angeles

Due to early maturity of some fruits, marketing and other conditions that arise from time to time, we receive a number of requests from shippers for slow service on certain perishable and manifest commodities. To avoid loss of traffic under these conditions due to circuitous routing we are, effective at once, establishing eastbound Slow Perishable and Manifest Train Schedules (SMX Service via Union Pacific, as per schedule attached.

[fol. 152] (Page 3 of 6 pages)

Traffic originating on Union Pacific on which SMX Service is requested by shipper, bill of lading, which shipper signs, and waybill must be endorsed:—

"SMX Service requested"

Fruit block consists prepared by PFE representative for perishable traffic blocked at Union Pacific concentration points will show (SMX) immediately following car number of any car on which SMX service has been requested.

Traffic originating and billed on other railroads and delivered to us at junctions such as Portland, Ogden, Los Angeles, Colton and others on which requests are received from shippers or consignees for SMX Service over Union Pacific should be obtained in writing from the shipper or consignee, and our Traffic representative or other employes receiving these requests will wire this office on traffic other than perishable shipments and we will handle with proper terminal on our line for SMX Service, and in such cases the terminal where SMX Service is started will endorse waybill, for example:—

"SMX Service from Laramie per ADH F-20 9-25-49."

Requests for SMX Service on perishable shipments should be given nearest PFE representative, including off-line offices, by wire who will handle in same manner as regular perishable diversions, and in such cases the terminal where SMX Service is started will endorse waybill, for example:—

"SMX Service from Laramie per ——
(initial of party sending telegram, symbol and date)."

PFE force preparing Roseville (RV) or Sacramento (WP) fruit block consists will show (SMX) immediately following car number of any car on which SMX Service has been requested prior to departure of such car from Roseville or Sacramento, which will eliminate wiring PFE representative Ogden or Salt Lake and other interested parties.

The attached schedule has been prepared covering SMX Service from the several different territories so yard clerks and others can readily determine schedule to be applied.

I am sending a supply of SMX stickers and which are to be applied to waybills covering cars on which SMX Service has been requested. This sticker is to be applied at the station or terminal where request for SMX Service first originates. For example, if Agent at Tacoma bills a car of lumber on September 26th on which SMX service is requested he will apply this sticker to waybill and under caption "Due Leave" he will insert "Albina, 1:30 PM, Sept. [fol. 153] (Page 4 of 6 pages) 28th". Sticker is prepared so yard clerks at subsequent terminals can check waybill, billing date, etc., and insert time and date due to leave that terminal. This will enable yard clerks to keep SMX bills together covering cars holding at terminal and by checking each day can advise yardmaster, chief dispatcher, and others of cars that are due to move out on SMX schedule that day. This will also enable subsequent terminals to take up delayed time in the event a car moving under SMX Service is bad ordered and delayed beyond time it is due to move from that terminal. For example, if an SMX car is bad ordered at Ogden and leaves there one day late on SMX schedule, when the car gets to Laramie the bill clerk by checking waybill can then determine from the attached schedule the day it is due to leave Laramie and endorse sticker accordingly so the traffic will not be moving late on SMX schedule.

SMX stickers are to be removed from waybills at interchange points where traffic is delivered to connections.

Traffic moving under SMX Service can be cancelled by shipper or consignee at any time while car is enroute and our Traffic representatives or others, including PFE repre-

sentatives, receiving such requests will wire nearest PFE representative on perishable shipments and this office on shipments other than perishable, who in turn will handle with proper terminal for cancellation of SMX Service, and that terminal will so endorse waybill, for example:—

> "SMX Service cancelled Laramie Sept. 26 —— (initial of party sending telegram, symbol and date)."

and yard clerk at that time will remove SMX sticker and handle with yardmaster to move that particular car out of that terminal in first fruit block for movement through to destination.

Particular attention must be given by all concerned to handling of perishable shipments under SMX Service. The schedules have been set up so as to move from one icing point to the next icing point with view to having perishable that requires icing iced as requested by PFE forces.

SMX perishable being held at icing stations will have to be iced and serviced when required in accordance with icing and servicing instructions, and PFE employes at those terminals will work closely with yardmaster so cars can be spotted for icing and servicing as required and as requested by PFE employes. Particular attention should be given to icing of SMX perishable where required just prior to departure from the holding terminals.

[fol. 154] (Page 5 of 6 pages)

While we cannot anticipate at this time to what extent we will handle SMX traffic, the schedules have been set up so such traffic can be moved from one holding terminal to the next on scheduled fruit or manifest trains, although if there is sufficient SMX traffic holding at a terminal to warrant running solid train of SMX cars, this should be done. The scheduled departures of SMX traffic as shown on the attached schedule should be adhered to as nearly as possible, although no objections to deviating from this to some extent, and particularly a later departure in order to avoid light tonnage or additional train miles.

I am sending copy of instructions, together with copy of schedule and supply of stickers, direct to Assistant

Superintendents or Trainmasters at holding terminals so they can properly instruct chief dispatchers, yardmasters and yard clerks on the handling as quickly as possible.

Will appreciate all concerned going over this thoroughly so there will be no misunderstanding regarding the handling that is to be given traffic on which SMX Service is requested.

There is, of course, to be no letdown in connection with maintenance of schedules with traffic that is not moving under SMX Service.

H-940.

A. D. Hanson

/s/ A. D. H.

[fol. 155]

Exhibit 3
(Page 6 of 6 pages)

SLOW PERISHABLE AND MANIFEST SCHEDULES
VIA UNION PACIFIC RAILROAD
(SMX)

	Southern Calif. via UP RR	Northern Calif. via SP RR	Northern Calif. via WP RR	Portland-Seattle Tacoma area via UP RR	Yakima-Spokane-Rieth area via UP RR
Billed date	0 day	0 day	0 day	0 day	0 day
Due Lv. Roseville		11:59P 1st "			
Lv. Roseville		11:59P 1st "			
Due Lv. Sacramento		(Regular sched	11:59P 1st day		
Lv. Sacramento		used to Ogden via SP and	11:59P 1st day		
Due Lv. Albina		takes SMX	(Regular sched	9:30P 1st day	
Lv. Albina		schedule via UP RR)	used to Salt Lake City via	1:30P 2nd "	
Due Lv. Rieth			WP and takes		10:00P 1st day
Lv. Rieth			SMX schedule via UP RR)		10:00P 3rd "
Due Lv. Colton	11:59P 1st day				
Lv. Colton	1:00P 2nd "				
Ar. Las Vegas	8:00A 3rd "				
Lv. Las Vegas	9:00P 4th "				
Ar. Salt Lake (PT)	8:00P 5th "		2:10P 3rd day		
Lv. Salt Lake (MT)	9:30P 6th "		9:30P 3rd "		
Ar. Ogden (MT)	11:00P 6th "	5:40P 3rd day	11:00P 3rd "		
Lv. Ogden (MT)	11:00A 9th "	11:00A 6th "	11:00A 6th "		
Ar. Rieth (PT)				2:00A 3rd day	
Lv. Rieth				10:00P 4th "	
Ar. La Grande				4:30A 5th "	4:30A 4th day
Lv. La Grande				9:30P 5th "	9:30P 4th "
Ar. Nampa (MT)				12:05P 6th "	12:05P 5th "
Lv. Nampa				11:00P 7th "	11:00P 6th "
Ar. Pocatello				11:30A 8th "	11:30A 7th "
Lv. Pocatello				6:30A 9th "	6:30A 8th "
Ar. Ogden	8:00P 9th day	8:00P 6th day	8:00P 6th day	8:30P 9th "	8:30P 8th "

Lv. Pocatello				6:30A 9th "	6:30A 8th "
Ar. Gr. River	8:00P 9th day	8:00P 6th day	8:00P 6th day	8:30P 9th "	8:30P 8th "
Lv. Gr. River	1:00A 10th "	1:00A 7th "	1:00A 7th "	1:00A 10th "	1:00A 9th "
Ar. Laramie	11:00A 10th "	11:00A 7th "	11:00A 7th "	11:00A 10th "	11:00A 9th "
Lv. Laramie	7:00A 12th "	7:00A 9th "	7:00A 9th "	7:00A 12th "	7:00A 11th "
Ar. Cheyenne	1:00P 12th "	1:00P 9th "	1:00P 9th "	1:00P 12th "	1:00P 11th "
Lv. Cheyenne	7:00P 12th "	7:00P 9th "	7:00P 9th "	7:00P 12th "	7:00P 11th "
Ar. No.Platte (MT)	3:00A 13th "	3:00A 10th "	3:00A 10th "	3:00A 13th "	3:00A 12th "
Lv. No.Platte (CT)	6:00P 14th "	6:00P 11th "	6:00P 11th "	6:00P 14th "	6:00P 13th "
Ar. Gr. Island	12:01A 15th "	12:01A 12th "	12:01A 12th "	12:01A 15th "	12:01A 14th "
Lv. Gr. Island	6:00A 15th "	6:00A 12th "	6:00A 12th "	6:00A 15th "	6:00A 14th "
Ar. Co. Bluffs	3:00P 15th "	3:00P 12th "	3:00P 12th "	3:00P 15th "	3:00P 14th "
Delvr Connections	11:00P 15th "	11:00P 12th "	11:00P 12th "	11:00P 15th "	11:00P 14th ""
Ar. Chicago	12:30A 17th "	12:30A 14th "	12:30A 14th "	12:30A 17th "	12:30A 16th "
Lv. No. Platte	11:30P 14th day	11:30P 11th day	11:30P 11th day	11:30P 14th day	11:30P 13th day
Ar. Kansas City	6:00P 15th "	6:00P 12th "	6:00P 12th "	6:00P 15th "	6:00P 14th "
Delvr Connections	11:00P 15th "	11:00P 12th "	11:00P 12th "	11:00P 15th "	11:00P 14th "
Lv. Laramie	4:00P 12th day	4:00P 9th day	4:00P 9th day	4:00P 12th day	4:00P 11th day
Ar. Denver	11:00P 12th "	11:00P 9th "	11:00P 9th "	11:00P 12th "	11:00P 11th "
Delvr Connections	2:00A 13th "	2:00A 10th "	2:00A 10th "	2:00A 13th "	2:00A 12th "

Office of
General Superintendent Transportation

Omaha, Nebraska
September 21, 1949

[fol. 156]

EXHIBIT 4 TO AFFIDAVIT

UNION PACIFIC RAILROAD COMPANY

Department of Traffic

CIRCULAR No. 205

Omaha—October 2, 1951.

File: B-80-225-74

ALL FREIGHT TRAFFIC OFFICERS,
GENERAL AGENTS, AND
FREIGHT TRAFFIC REPRESENTATIVES:

Referring to various advices indicating our competitors are indulging in circuitous routing to effect slower than scheduled movement of certain commodities:

It is not possible for us to reinstate our SMX schedules, but we have concluded to meet the competitive situation with which we are confronted by moving traffic so billed via Ellis, Kansas. It will be necessary for shippers desiring the slower service to show in the routing column of the bill of lading "Union Pacific via Ellis, Kansas". On shipments interchanged at Council Bluffs, this will add approximately three days to the normal schedule, while on shipments interchanged at Kansas City it will add approximately two days to the normal schedule. Shipments so routed will be handled on regular trains, using first available connection, but it should be thoroughly understood that we are not undertaking to guarantee any set schedule via this routing, whether the traffic involved is dead freight or perishable.

Mr. Hanson will issue appropriate instructions to Transportation and Operating Departments so that shipments waybilled for routing via Ellis are handled accordingly.

Please give this attention where appropriate in your respective territories.

J. R. MACANALLY

[fol. 157]

EXHIBIT 5 TO AFFIDAVIT

UNION PACIFIC RAILROAD COMPANY

Department of Traffic

CIRCULAR No. 208

Omaha—October 8, 1951.

File: B-80-225-74.

ALL FREIGHT TRAFFIC OFFICERS,
GENERAL AGENTS, AND
FREIGHT TRAFFIC REPRESENTATIVES:

Supplementing our Circular No. 205, of October 2nd, about routing via Ellis, Kansas:

By and large, rates via Missouri River gateways apply via North Platte or Ellis, and shippers have the prerogative under existing tariffs to specify such routing. There are some exceptions, such as grain from Oregon, Washington and Idaho to the east; also certain traffic moving under tariffs subject to routing provisions contained in Union Pacific Tariff No. 175. The arrangement suggested in Circular No. 205 will not supersede any tariff restrictions to the contrary.

It is felt these restrictions will not be of any particular importance, since there are only certain commodities where we have a competitive situation to meet, but the possible exceptions are called to attention to avoid any complications.

It should be obvious that both this circular and Circular No. 205 should not be distributed to outside parties.

J. R. MACANALLY

[fol. 158]

EXHIBIT 6 TO AFFIDAVIT

SB

OMA DEC 6, 1951

FBS—Cinti

A-249. See my Circular 208. No objection routing any traffic via Ellis if rates apply and there are no tariff restrictions against routing canned goods from North or South Coast origins via Ellis to MoRiver and beyond. S-306

J R M

11:15AM

[fol. 159]

EXHIBIT 7—SERVICE ORDER No. 910

Omitted. Printed side folio 84, page 65, supra.

[fol. 161]

EXHIBIT 8 TO AFFIDAVIT

INTERSTATE COMMERCE COMMISSION
Bureau of Safety and Service

105786-2 Washington 25

July 2, 1956

Mr. A. H. Gass, Chairman
Car Service Division
Association of American Railroads
Transportation Building
Washington 6, D. C.

Dear Mr. Gass:

A lumber shipper in Seattle has complained account carriers refusing to sign bills of lading for lumber specify-

ing routes now in tariffs on the basis that Service Order No. 910 precludes their handling via designated routes. The following is quoted:

> "To give some specific examples, 1.—T.C.F.B. Tariff 28-0, ICC 1545, supplement 71, item 230, exception 2, note B provides routing in connection with the NP from Seattle, Wash. via Oakes, North Dakota to Minneapolis. NP declines to sign bills of lading via this route as it is their interpretation of the Service Order they cannot handle cars in this manner. 2.—T.C.F.B. Tariff 28-0, ICC 1545, supplement 71, item 230, exception 5, note 2, provides for routing with the Soo Line via Portal, Thief River Falls, Duluth to Minnesota Transfer. Soo Line contends Service Order will not allow them to handle cars via this route. 3.—T.C.F.B. Tariff 28-0, supplement 60, ICC 1545, item 277 provides that routing in connection with the CRI&P will apply through Abilene, Kansas. For an example, from Oregon points you can route SP, Ogden, D&RGW, CRI&P via Abilene, Kansas to Kansas City, Missouri for diversion. Same story applies to this routing as others listed above."

Also he asked for an interpretation in connection with Mr. H. E. Shumway's wire of June 18 regarding routing shipments originating in California destined Omaha routing SP, UP and divert en route to Des Moines, Iowa, routing SP, UP, Denver, AT&SF, RS&P, T&P, Shreveport, KCS, Fort Smith, StLSF, Kansas City, UP, Omaha, CStPMO, Sioux City, IC, Fort Dodge, M&StL.

All of the above examples are covered by current tariffs permitting such routing. Service Order No. 910 does not prohibit railroads from accepting shipments which are routed under present applicable tariff routes.

Very truly yours,

/s/ C. W. Taylor

C. W. Taylor,
Director

[fol. 162]

EXHIBIT 9 TO AFFIDAVIT

(Page 1 of 9 pages)

UNION PACIFIC RAILROAD COMPANY

July 24, 1956
A-52-243-910.

Honorable Owen Clarke, Commissioner,
Interstate Commerce Commission,
Washington, D. C.

Dear Commissioner Clarke:

Referring to conference which Mr. P. J. Lynch, our Vice-President, had with you and Mr. Taylor in Washington, June 8th, about our serious concern over the probable effect on Union Pacific of Interstate Commerce Commission Service Order No. 910, the enforcement of which was subsequently undertaken commencing June 13th:

Lumber is one of the most important commodities handled by Union Pacific. In 1955, the single item of lumber, shingles and lath (I.C.C. Commodity Index No. 411) was responsible for 11.56 per cent of total tonnage handled and 13.64 per cent of total gross freight revenue. During the first six months of 1956 this same item involved 90,451 cars and $29,055,338 gross freight revenue, averaging $321.22 per car.

While Service Order No. 910 was intended primarily to eliminate the slow movement of lumber as a means to increase freight-car utilization, it is our definite feeling that objective has not been accomplished to any substantial degree. It has instead resulted in the use of routes of extreme circuity while at the same time depriving Union Pacific of the opportunity to participate in a substantial volume of lumber traffic. Since enforcement was undertaken June 13th, we estimate have completely lost a minimum of 1,542 cars and have been short-hauled on 69 others. This is traffic we would normally handle. Based on average revenues, the loss or short-haul of this traffic during the first month that Service Order No. 910 has been operative is calculated, in round figures, at $506,000 of Union Pacific gross freight revenue.

We have actual detailed record, including car numbers, origins, destinations, routings, etc. on 454 cars which moved adversely to Union Pacific, and which we would normally

[fol. 163] have handled in the absence of Service Order No. 910. This detailed data was furnished by the shippers involved. A summary of this particular movement is tabulated on Exhibit "A" enclosed.

In addition, based upon their knowledge of traffic Union Pacific normally handles from many other shippers involved, our representatives have estimated a further loss during this first month of 1088 cars, summarized on Exhibit "B" enclosed. I should like to point out, however, that we do not consider this as being all-inclusive of additional traffic lost.

We likewise have knowledge of short-haul movements on 69 other cars which we would normally have handled for our maximum haul, summarized on Exhibit "C" enclosed. On 19 of these, routed via Union Pacific between Kansas City and Council Bluffs only, diversions en route may deprive Union Pacific of any participation in the shipment.

As evidence that the claim of lost traffic outlined above is stated most conservatively, I invite your attention also to Exhibit "D" enclosed. It seems to me the total loading of "forest products" by the western railroads tabulated can be fairly said to represent the over-all business condition of the western lumber industry. Note it shows a slight increase, 1956 over 1955. In decided contrast, note also that Union Pacific's receipts from connections are down sharply. We have every reason to believe this decrease of 1,988 cars is even more representative of our loss of traffic because of Service Order No. 910 than the 1,542 cars covered by Exhibits "A" and "B". Likewise we feel that the slight increases of CMStP&P and GN and decrease of UP in on-line loadings, in contrast to the sharp increase in NP on-line loadings, is indicative of additional use of NP service from origins which they serve in common with CMStP&P, GN and UP, of which there are quite a number.

As pointed out by Mr. Lynch during the conference June 8th; and as previously made known to Mr. Taylor by Mr.

Gass' letter of March 26th, copy enclosed for convenient reference as Exhibit "E", it was our view Service Order No. 910 would simply operate to deprive direct routes of participation in this traffic since shippers would avail themselves of routes of extreme circuity to obtain the slower service desired. From the first month's experience it is altogether obvious this situation has developed as anticipated, to the detriment of Union Pacific.

While not all indicative of the "worst" examples, there is also enclosed herewith as Exhibit "F", a statement listing

(Page 3 of 9 pages)

[fol. 164] 23 cars which moved via SP-SP&S-NP to Minneapolis or Minnesota Transfer or via SP-SP&S-NP-CStPM&O to Omaha, showing shipping and arrival dates as developed from shipper's records. It will be noted shipments to Minneapolis or Minnesota Transfer were in transit from origin from a low of 9 days to a high of 23 days, although the last car, shipped June 26th, had not reached Minnesota Transfer on July 12th. To Omaha the transit time ranged from a low of 9 days to a high of 17 days. In all instances, these shipments were routed over the Northern Pacific's direct route, rather than via Oakes, North Dakota, or the transit time would undoubtedly have been several days longer via that station.

Your attention is respectfully directed to letter which Mr. Taylor addressed Mr. Gass July 2nd, copy enclosed for convenient reference marked Exhibit "G" *, advising that Service Order No. 910 does not prohibit railroads from accepting shipments which are routed under present applicable tariff routes. This letter specifically approves routing via Northern Pacific to Minneapolis, Minn., via Oakes, North Dakota; via Soo Line through Portal, North Dakota via Thief River Falls and Duluth to Minnesota Transfer, Minn., and via CRI&P via Abilene, Kansas, to Kansas City, Mo. "Lumber Communication Service" issued advice to their subscribers July 12th, confirming this advice, and adding "cars via these routes will have the effect of slowing down the traffic." We know that representatives of the

* Attached hereto and made a part of this affidavit as Exhibit 8.

lines in question are actively soliciting traffic for movement via the routes named. We also have advice, not confirmed as official, that service of CRI&P from Denver to Kansas City via Abilene is described as "seven to nine days".

Because of the widespread use of extremely circuitous routes which Service Order No. 910 does not restrict; and in view of Mr. Taylor's interpretation of July 2nd, I am sure you will readily appreciate the adverse reaction of Service Order No. 910 against the Union Pacific is a matter of urgently serious concern. I will greatly appreciate an early expression of your views as to what the Interstate Commerce Commission will do to correct this obviously discriminatory condition.

Yours very truly,

/s/ W. T. Burns

[fol. 165] EXHIBIT "A"

SUMMARY OF CARS LOST BY UNION PACIFIC DURING PERIOD JUNE 13th to JULY 12th, INCLUSIVE, ON WHICH COMPLETE DETAILS ARE AVAILABLE

Consolidated Lbr. Co., Eugene	To Minneapolis	7
Cottage Grove Lbr. Co., Cottage Grove	To Minneapolis	7
Eugene-Willamette Lbr. Co., Eugene	To Minneapolis	61
Jacobsen Lbr. Co., Eugene	To Chicago	1
do	To Farwell, Tex.	1
do	To Kansas City	7
do	To Minneapolis	9
do	To Topeka	52
Ketchum Co., H. H., Seattle	To Minneapolis	1
Lovegren & Husted Lbr. Co., Cottage Grove	To Kansas City	4
do	To Omaha	14
Marley Co., Stockton	To Indianapolis	1
do	To Lincoln, Neb.	1
do	To Monroe, Mich.	1
North Pacific Lbr. Co., Portland	To Omaha	2
Northwest States Lbr. Co., Seattle	To Minneapolis	2
Shamrock Lbr. Co., Eugene	To Council Bluffs	4
do	To Kansas City	30
do	To Minneapolis	35
do	To Topeka	14
Teague Lbr. Co., Eugene	To Kansas City	13
do	To Topeka	5
Timberlane Lbr. Co., Eugene	To Council Bluffs	9
do	To Kansas City	11
do	To Minneapolis	5
do	To Omaha	112
do	To Proviso	3
do	To St. Louis	27
Trio Lbr. Co., Eugene	To Minneapolis	13
Watson Lbr. & Millwork Co., Sacramento	To Cincinnati	1
Western Pacific Lbr. Co., Portland	To Minneapolis	1
TOTAL		454

(Page 5 of 9 pages)

[fol. 166]

EXHIBIT "B"

SUMMARY OF ESTIMATED ADDITIONAL CARS LOST BY UNION PACIFIC DURING PERIOD JUNE 13TH TO JULY 12TH, INCLUSIVE, ON WHICH DETAILED DATA NOT AVAILABLE, BUT ON WHICH LOSS IS BASED ON KNOWN TRAFFIC NORMALLY HANDLED BY UNION PACIFIC PRIOR TO SERVICE ORDER NO. 910.

Alexander Lbr. Co.	To Minn. Tfr. & St. Louis	17
Atlantic Lbr. Co.	To Crete, Nebr.	25
Bate Lbr. Co., J. Herbert	To Various	40
Black Diamond Lbr. Co.	To Minn. Tfr. & St. Louis	21
Chapman Lbr. Co.	To Co. Bluffs & Kansas City	100
Crescent Lbr. Co.	To Minnesota Transfer	7
Dancren Lbr. Co.	To Council Bluffs	2
Devoe Lbr. Co.	To Council Bluffs	12
Esquire Lbr. Co.	To Kansas City	25
Eugene-Willamette Lbr. Co.	To Minnesota Transfer	3
Evans Lbr. Co.	To Springfield, Mo.	31
Forest Glen Lbr. Co.	To Co. Bluffs & San Antonio	19
Garrett Co., L.B.	To Minn. Tfr. & St. Louis	12
Gray Lbr. & Shingle Co.	To Minnesota Transfer	5
Hampton Lbr. Co.	To Kansas City	100
Hemphill-O'Neill Lbr. Co.	To Minnesota Transfer	30
Leavitt Lbr. Sales Co.	To Texas Points	56
Longman Lbr. Co.	To Omaha & Buffalo	18
Lumber Wholesalers, Inc.	To Council Bluffs	7
Main Lbr. Co.	To Texas Points	5
Mauk-Seattle Lbr. Co.	To Minnesota Transfer	1
North Pacific Lbr. Co.	To Various	200
Pacific Forest Products Co.	To Minnesota Transfer	14
Pacific Western Lbr. Co.	To Minnesota Transfer	30
Patrick Lbr. Co.	To St. Louis	24
Ryan Lbr. Co., Leo H.	To Various	80
Shamrock Lbr. Co.	To Minnesota Transfer	1
United Lbr. Co.	To Minnesota Transfer	30
Vollstedt-Kerr Lbr. Co.	To Various	72
Western Lbr. Co.	To Council Bluffs	65
Whipple & Moshofsky Lbr. Co.	To Various	35
Winton Lbr. Co.	To Brooklyn	1
	TOTAL	1088

[fol. 167] EXHIBIT "C"

SUMMARY OF CARS SHIPPED DURING PERIOD JUNE 13TH TO JULY 12TH, INCLUSIVE, ON WHICH UNION PACIFIC WAS SHORT-HAULED.

Black Diamond Lbr. Co., Redding & Sacramento, Cal.
To Council Bluffs, Ia., via SP-UP-Denver-AT&SF-& Various 1

California Shasta Lbr. Co., Montague, Cal.
To Council Bluffs, Ia. via SP-UP-Denver-AT&SF-& Various 1

Continental Lbr. Co., Arcata, Cal.
To Mansville, Ohio stop Dayton, Ohio via SP-UP-Denver-C&S-FW&D-T&NO-SSW-IT-NYC 1

Crawford, Lbr. Co., Norlake, Cal.
To Council Bluffs, Ia. via NWP-SP-UP-Denver-AT&SF-RS&P-T&P-P&SF-T&NO-SSW-KCS-Kansas City-UP 1

Fleishman Lbr. Co., Burney, Cal.
To Council Bluffs, Ia. via MC-SP-UP-Denver-AT&SF-& Various 4

Kinzua Lbr. Co., Kinzua, Oregon
To Joliet, Ill. via UP-Spokane-SI-CP-SOO-CB&Q-GM&O 1

Lambert Voegtly Lbr. Co., Lakeview & Medford, Oregon
To Council Bluffs, Ia. via SP-Deming-AT&SF-RS&P-T&P-P&SF-T&NO-San Antonio-MP-MK&T-Kansas City-UP 1

Loveness Lbr. Co., Camby, Dunsmuir, Burney, Hatfield & Rawson, Cal.
To Council Bluffs, Ia. via SP-UP-Denver-AT&SF-& Various 9

Main Lbr. Co., Redding, Calif.
To Council Bluffs, Ia. via SP-UP-Denver-AT&SF-& Various 1

McCollum Lbr. Co., Alturas, Cal.
To Council Bluffs, Ia. via SP-UP-Denver-AT&SF-& Various 1

Nikkel Lbr. Co., Red Bluff, Cal.
To Council Bluffs, Ia. via SP-UP-Denver-AT&SF-& Various 1

Oregon-Pacific Lbr. Co., Portland, Ore.	
To Crete, Neb. via UP-Portland-SP-D&RGW-CB&Q	6
To Minneapolis, Minn. via UP-Portland-NP	1
Pacific Western Lbr. Co., Hood River & Lakeview, Ore.	
To Gary, Ind. via UP-Spokane-SI-CP-SOO-M&StL-WAB-EJ&E	2
To Kansas City, Mo., via SP-UP-Denver-CRI&P	2
Park Forest Products Co., Fernbridge, Cal.	
To Council Bluffs, Ia. via NWP-SP-UP-Denver-CRI&P	4
Park Lbr. Co., Hood River, Oregon	
To Gary, Ind. via UP-Pullman-CRI&P-C&NW-CNS&M-EJ&E-CSS&SB	1
Sine Bros. Co., Merlin, Oregon	
To Chicago, Ill. via SP-UP-Ellsworth-StLSF-IC	1
Southern States Lbr. Co., Lebanon, Ore.	
To Detroit, Mich. via SP-UP-Denver-AT&SF-RS&P-T&P-PS&F-T&NO-MK&T-Kansas City-UP-C&NW-C&O	1
Superior Lbr. Co., West Sacramento, Calif.	
To Council Bluffs, Ia. via SP-UP-Denver-AT&SF-& Various	3
To Gary, Ind. via SP-UP-Denver-AT&SF-& Various	4
Ukuah Lbr. Co., Rieth, Ore.	
To Medford, Wis. via UP-Spokane-SI-CP-SOO	2
Wheeler Hallock Lbr. Co., Bieber, Cal.	
To Council Bluffs, Ia. via WP-UP-Denver-AT&SF-& Various	1
TOTAL	69

[fol. 168] EXHIBIT "D"

STATEMENT SHOWING "FOREST PRODUCTS" LOADED ON WESTERN RAILROADS FOR COMPARATIVE PERIOD OF FOUR WEEKS, AS REPORTED ON WEEKLY REPORT FORM CS-54-A ISSUED BY CAR SERVICE DIVISION, ASSOCIATION OF AMERICAN RAILROADS.

	June 10 to July 7 1956	June 12 to July 9 1955	Incr. Dec.	Per cent
Atchison, Topeka & Santa Fe	4,130	3,527	603	17.10
Chicago, Milwaukee, St. Paul & Pacific	11,672	11,496	176	1.53
Great Northern	7,494	7,397	97	1.31
Northern Pacific	13,229	11,792	1,437	12.19
Northwestern Pacific	5,461	4,493	968	21.54
Sacramento Northern	92	164	d 71	d43.29
Southern Pacific	25,901	27,832	d1,931	d 6.94
Spokane International	538	593	d 55	d 9.27
Spokane, Portland & Seattle	5,085	5,758	d 673	d11.69
Union Pacific	6,879	7,033	d 154	d 2.19
Western Pacific	583	671	d 88	d13.11
TOTAL WESTERN RAILROADS	81,065	80,756	309	.38

UNION PACIFIC TRAFFIC IN "FOREST PRODUCTS" TAKEN FROM ACTUAL OPERATING RECORDS.

	June 10 to July 7 1956	June 10 to July 7 1955	Incr. Decr.	Per cent
Loaded on line	6,879	7,204	d 325	d 4.51
Received from foreign connections	14,130	16,118	d1,988	d12.33
TOTAL UNION PACIFIC FOREST PRODUCTS	21,009	23,322	d2,314	d 9.92

(Page 8 of 9 pages)

[fol. 169] EXHIBIT "E"

COPY

March 26, 1956
File: 654-910

Mr. C. W. Taylor, Director,
Bureau of Safety and Service,
Interstate Commerce Commission,
Washington 25, D. C.

Dear Mr. Taylor:

I have received the following telegram from Mr. Shumway of the Union Pacific:

"Referring to I.C.C. Service Order No. 910. Assume this is outgrowth of matter dealt with in Taylor's letter to you August 25, 1955 which you sent me with your letter August 26th. If so purpose Service Order No. 910 is still effectively stop waste car days now occurring. Will appreciate it if you will again review my letter August 31st in which we commented on Service Order under consideration at that time. While Service Order No. 910 as issued met some of our objections it still will not fully accomplish purpose for which intended because there is no restriction against use of regular tariff routes of extreme circuity, some examples of which were cited in my letter. Shippers still have right to route and will use it unless otherwise restricted to circumvent intent of Service Order No. 910 and which in final analysis will simply eliminate direct routes from handling traffic on which shippers want slow service. Believe this should be called to the Commission's attention and will appreciate any further advice you can give us. S 140."

I have told Mr. Shumway that his letter of August 31, 1955 was considered by the Commission before issuance of Service Order No. 910 and that his present telegram is being forwarded to you.

Yours very truly,

(signed) A. H. Gass

[fol. 170] EXHIBIT "F"

STATEMENT SHOWING PERFORMANCE ON REPRESENTATIVE SHIPMENTS MOVING VIA NORTHERN PACIFIC AND CONNECTIONS.

To Minnesota Transfer or Minneapolis via SP-SP&S-NP:

Car Number	Origin	Shipping Date	Arrival Date	Days in Transit
B&O 269103	Dillard	June 15	June 25	10
B&O 273978	Dillard	June 15	June 25	10
B&M 71095	Dillard	June 15	June 25	10
GN 38944	Sutherlin	June 15	June 26	11
NYC 121123	Green	June 16	June 28	12
NYC 36685	Eugene	June 16	June 26	10
PRR 78214	Oaks	June 14	June 27	13
LV 75124	Riddle	June 26	July 19	23
PRR 101127	Goshen	June 25	July 4	9
IC 10718	Swisshome	June 28	July 12	14
PRR 503703	Swisshome	June 29	July 12	13
RDG 106609	Swisshome	June 26	July 12*	16

12 cars in transit 151 days, average 12.58 days

To Omaha via SP-SP&S-NP-CStPM&O:

Car Number	Origin	Shipping Date	Arrival Date	Days in Transit
B&O 273448	Eugene	June 18	July 1	13
NYC 117418	Molalla	June 22	July 3	11
NYC 36496	Eugene	June 18	July 5	17
PRR 103271	Saginaw	June 28	July 7	9
B&O 381896	Drain	June 25	July 8	13
ATSF 11657	Gervais	June 26	July 12*	16
NP 27966	Green	June 15	June 26	11
PLE 22675	Green	June 15	June 27	12
TNO 58904	Gr.Ronde	June 15	June 25	10
PRR 77388	Gr.Ronde	June 15	June 25	10
CBQ 35392	Gervais	June 13	June 28	15

11 cars in transit 137 days, average 12.45 days

* Indicates car had not arrived destination by date shown.

[fol. 171]

EXHIBIT 10 TO AFFIDAVIT

INTERSTATE COMMERCE COMMISSION
Washington 25

July 30, 1956

Mr. W. T. Burns
Vice-President—Traffic
Union Pacific Railroad Co.
Omaha 2, Nebraska

Dear Mr. Burns:

This will acknowledge receipt of your letter of July 24, file A-52-243-910, regarding ICC Service Order No. 910 and the effect it has had on lumber shipments routed via the Union Pacific Railroad.

Service Order No. 910 was intended to eliminate the use of freight cars as storage during the present box car shortage. Among the practices prevalent prior to the issuance of Service Order No. 910 was the slow schedule efforded certain lumber shippers whereby they were allowed thirty days' free storage en route between originating points in the Northwest and the Missouri River crossings. This traffic-solicitation inducement was offered and provided without tariff authority and without demurrage or storage charges being assessed.

A check at Council Bluffs covering 1,400 cars during the period September 26, 1955 to February 20, 1956 showed that 1,014 cars were en route from origin to Council Bluffs an average of 29.2 days per car; whereas the average time in transit should not have been over 8 days per car. A check of 288 cars at Omaha billed prior to June 13, 1956, consumed an average of 18.3 days from origin to arrival at Council Bluffs. Ninety-five cars checked at Council Bluffs on June 29, which had been billed June 13, and thereafter, consumed an average of 8.32 days en route. This would indicate that Service Order No. 910 has had the effect of eliminating the unauthorized so-called 30-day schedule.

You state that since enforcement was undertaken on June 13, you estimate that you have lost a minimum of 1,542 cars and have been short-hauled on 69 others, and that this is traffic that you would normally handle.

Service Order No. 910 does not prohibit railroads from accepting shipments which are routed under present applicable tariff routes; and if Service Order No. 910 creates a [fol. 172] discriminatory condition against the Union Pacific Railroad, which you allege, it is due to the apparent practice of your railroad and others of allowing certain shippers concessions in the matter of storage in transit not accorded all shippers.

The Commission is having field checks made to see that Service Order 910 is complied with and that lumber shipments are being handled strictly in accordance with tariff routings and charges, and any violations of the Order or failure to assess proper charges will be handled for prosecution.

Sincerely yours,

/s/ Owen Clarke
Owen Clarke
Commissioner

[fol. 173]

EXHIBIT 11 TO AFFIDAVIT

(See Opposite) ☞

B-52-243-910

Oma—Dec 7 1956

(Freight—28)

T E L E G R A M

(HLL—NY
(LGS—NY

(HCY—Chgo
(JMA—Chgo
(TLV—Chgo
(WVL—Chgo
(WWC—Toronto
(GAB—Cleveland
(PSS—Atlanta
(JDG—B'ham
(GER—Memphis
(DVR—N Olns
(EWM—Cinti
(CJS—Detroit
(FOK—Detroit
(RTP—Milwaukee
(DRW—Win-Salem

(LLC—St Joe
(FSB—Salina
(RAW—Topeka

(CWE—Port
(TJD—Port
(DS—Port
(CWR—Bend
(JEA—Eugene
(JML—W Walla
(RAH—Yakima
(CHJ—Aberdeen
(HJB—Lewiston
(JRL—Spokane
(FGR—Tacoma
(PAA—Seattle
(JCS—Medford

(Echele—Denver
(ABT—Denver

(SR—SLake
(RFP—SLake

(DRA—KC
(AHG—KC

(JWP—LA
(FLM—LA
(JDM—LA

(MHF—SFran
(FCB—SFran

(JAG—Oakland
(HGP—Fresno
(FAF—Sacto
(HGL—SDiego
(WMC—Reno
(CB—Stockton
(WAS—Glendale
(HJD—LBeach
(LAW—Pasadena
(JLB—Riverside
(JVC—SPedro
(EGH—Santa Ana
(LML—Las Vegas
(Wac—SMonica
(HCD—San Jose

(CEA—Chian
(FHG—Chian
(FMP—Gering

(KLJ—Boise
(RAA—Poca
(JDF—Butte

HFB—Pitts
MWC—Boston
WDH—Phila
JRH—Wash
CAR—Mpls
TWG—StLouis
WWM—DMoines
LJR—SiouxCy
JCB—Oma (3)
RAF—Omaha
JFT—Lincoln
JFB—Ogden
MAA—Dallas
LBB—Tulsa

Service Order 910 being vacated midnight tonight. We are not reinstating routing via Ellis but instead will continue routing via Colby with understanding such traffic in future will move via main line in special service on 14-day schedule Ogden to Council Bluffs. B-9

J R M

415 p

[fol. 174]

EXHIBIT A-2 TO MOTION

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

WESTERN DIVISION

Civil Action No. 1-299

UNITED STATES OF AMERICA,

Plaintiff,

v.

UNION PACIFIC RAILROAD COMPANY,

Defendant.

AFFIDAVIT IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT HERETOFORE FILED HEREIN AND IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT FILED HEREIN (F.R.C.P. Rule 56)

STATE OF NEBRASKA)
ss.
COUNTY OF DOUGLAS)

J. R. MacAnally, being first duly sworn, deposes and says:

1. Defendant, Union Pacific Railroad Company, is a corporation organized and existing under the laws of the State of Utah and having its principal place of business at Omaha, Nebraska.

2. That he is J. R. MacAnally, General Freight Traffic Manager, Union Pacific Railroad Company, 1416 Dodge Street, Omaha, Nebraska, and has personal knowledge of the facts herein set forth and makes this affidavit in opposition to plaintiff's motion for summary judgment heretofore filed herein and in support of defendant's motion for summary judgment also filed herein.

3. That at no time pertinent hereto was there in effect (to the best of affiant's knowledge there never has been)

any order, rule or regulation of the Interstate Commerce Commission requiring or purporting to require defendant, or any other railroad common carrier, to file tariffs pub-
[fol. 175] lishing freight train or other train schedules showing the "running time" of its trains or the time within which defendant may offer, undertake or propose to move shipments between points on its line; or requiring or purporting to require that all shipments be moved over defendant's line or route upon the same train schedule, speed or running time; or requiring or purporting to require defendant to publish or collect more or greater freight charges for moving one shipment faster or slower than another shipment; or requiring or purporting to require defendant to limit or restrict application of its freight rates to the shortest and fastest of alternate routes available via its individual lines; or to publish or collect from shippers any separate or specific charge for the use of cars in which shipments are hauled; or for the storage of shipments in cars in defendant's possession while in transit over its line; or for the use of defendant's trackage used in transporting shipments over its line; or requiring or purporting to require defendant to operate its railroad or trains in such manner as to avoid setting out cars of freight at sidings along its line; or so as to avoid increasing, reducing or controlling in any way per diem cost for the use of foreign cars on defendant's line.

Further affiant sayeth not.

/s/ J. R. MacAnally
Affiant

Subscribed and sworn to before me this 26th day of September, 1958.

(SEAL)

/s/ Louis Scholnick
Notary Public

[fol. 176] CERTIFICATE OF SERVICE

I, Addison C. Kistle, one of the attorneys for defendant herein, do hereby certify that on this 1st day of October, 1958, I served a true copy of the foregoing "Motion in

Opposition to Plaintiff's Motion for Summary Judgment, and For Summary Judgment in favor of Defendant (F.R. C.P. 56)" upon the attorneys of record for plaintiff herein by mailing the same, duly addressed and with postage prepaid, to Roy L. Stephenson, United States Attorney, and John C. Stevens, Assistant United States Attorney, 202 U. S. Court House, Des Moines, Iowa, the said address being shown on the complaint herein.

/s/ Addison C. Kistle
Addison C. Kistle

[fol. 177] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

WESTERN DIVISION

[Title omitted]

DEFENDANT'S MOTION FOR LEAVE TO AMEND ITS ANSWER TO THE COMPLAINT HEREIN AND TO AMEND ITS "MOTION IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, AND FOR SUMMARY JUDGMENT IN FAVOR OF DEFENDANT" AND TO FILE A MEMORANDUM IN CONNECTION WITH THE AMENDMENTS—Filed December 15, 1958

Defendant moves the Court to enter an order granting it leave to amend, *instanter,* its answer to the complaint herein by adding to its answer a new and additional paragraph numbered "11", as follows:

> "11. By order dated October 27, 1958, the Interstate Commerce Commission, in Investigation and Suspension Docket No. 7050, *Lumber—Free Time Allowance at Hold Points,* suspended tariffs filed by several railroads, not including this defendant, offering to perform without extra charge a 15-day service in the movement of lumber from the Northwest, and instituted its own investigation to determine the 'lawfulness' of the suspended tariffs 'with a view to making such findings and orders in the premise as the

> facts and circumstances shall warrant,' and to include in such investigation 'all matters and issues with respect to the lawfulness of the said schedules under the Interstate Commerce Act.' The 'lawfulness' of the performance of a slow or delayed service for lumber shippers involves questions within the exclusive primary administrative jurisdiction of the Commission [fol. 178] and having asserted that jurisdiction, the Commission has superseded the jurisdiction of this Court and created a situation which renders futile and useless further proceedings by this Court in the instant case and calls for the dismissal of the complaint herein. Copies of the tariffs of other railroads so suspended and copy of the Commission's order dated October 27, 1958, are attached hereto as Exhibit "A" and made a part hereof."

and granting it leave to amend, *instanter,* its "motion in opposition to plaintiff's motion for summary judgment and for summary judgment in favor of defendant" by adding "A-3" after the words "Exhibits A-1 and A-2" in the next to the last line of said motion and by attaching thereto and making a part thereof as "Exhibit A-3", certified copies of the aforesaid tariffs filed by other carriers offering to perform slow or delayed service, and certified copy of the Commission's order dated October 27, 1958, suspending said tariffs and instituting an investigation concerning the "lawfulness" of said tariffs, copies of which tariffs and order are hereto attached as Exhibit "A".

Defendant further asks leave to serve and file on or before December 22, 1958, a memorandum with respect to the questions raised by the amendments, which, defendant believes, entitles it to a dismissal of the complaint.

As grounds for this motion defendant respectfully shows:

The complaint herein alleges that defendant performs a 14-day "delayed service" for certain lumber shippers from the Northwest area to Council Bluffs, Iowa, "without charge and not pursuant to specific tariff provision" and that this

constitutes the granting and giving of concessions and discriminations in violation of Section 1 of the Elkins Act, and the extension of privileges and facilities not specified in [fol. 179] tariffs, in violation of Section 6(7) of the Interstate Commerce Act, and the complaint prays that the Court issue an injunction enjoining and restraining the alleged violations.

After defendant had filed, on January 10, 1958, its answer to the complaint herein and after it had filed, on October 1, 1958, its "motion in opposition to plaintiff's motion for summary judgment, and for summary judgment in favor of defendant", several other railroads, not including defendant, filed tariffs with the Interstate Commerce Commission publishing the fact that they offer, without charge in addition to the line-haul rates, to perform a 15-day delayed or "hold" service for Northwest lumber shippers, which amounts to the same type and kind of service the complaint herein alleges to be unlawful because defendant is performing such service without tariff publication. By order dated October 27, 1958, the Commission, in Investigation and Suspension Docket No. 7050, *Lumber—Free Time Allowance at Hold Points,* suspended all of such tariffs until June 1, 1959, thereby refusing to allow them to become effective, and instituted its own investigation to determine the "lawfulness" of the suspended tariff provisions "with a view to making such findings and orders in the premise as the facts and circumstances shall warrant." Thus, while the Government, at the instigation of the Commission, is asking the Court to hold in the case at bar that defendant violates statutory provisions by not publishing its 14-day service in tariff form, the Commission has now suspended the tariffs of other railroads publishing their offers to perform 15-day service, and has entered upon its own investigation to make determinations, findings of fact and orders concerning and embracing the very same questions upon which the complaint asks this Court to make findings and determinations and issue its injunction. Having asserted its exclusive administrative jurisdiction over those questions, the Commission has super-

seded the jurisdiction of this Court and created a situation which renders futile and useless any further proceed-
[fol. 180] ings by this Court in the instant case and calls for dismissal of the complaint herein.

W. R. Rouse, Elmer B. Collins, James H. Anderson, 1416 Dodge Street, Omaha 2, Nebraska, Addison C. Kistle, 414 Wickham Bldg., Council Bluffs, Iowa, Attorneys for Defendant.

Acknowledgment of Service (omitted in printing).

[fol. 181]

EXHIBIT A TO MOTION

[fol. 182]

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Board of Suspension, held at its office in Washington, D. C., on the 27th day of October, A. D., 1958.

INVESTIGATION AND SUSPENSION DOCKET NO. 7050

LUMBER—FREE TIME ALLOWANCE AT HOLD POINTS

It appearing, That there have been filed with the Interstate Commerce Commission tariff schedules setting forth new rules, regulations and practices affecting rates and charges, applicable on interstate or foreign commerce, to become effective November 2, 1958, and later, designated as follows:

H. R. HINSCH, Agent:
SUPPLEMENT 6 to I.C.C. No. 4808, on page 2 thereof, in Item 175-A; the third paragraph;

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY:
Supplement 20 to I.C.C. 20458, on page 2 thereof, in ITEM 115-A, paragraph (e);

Chicago, Milwaukee, St. Paul and Pacific Railroad Company:
SUPPLEMENT 4 to I.C.C. B-7891, on page 2 thereof, in Item 65-A, EXCEPTIONS 3 and 4;

Chicago and North Western Railway Company:
SUPPLEMENT 4 to I.C.C. 11362, on page 2 thereof, in Item 20-A, EXCEPTIONS 3 and NOTE 2;

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY:
SUPPLEMENT 2 to I.C.C. C-13584;

Illinois Central Railroad Company:
Supplement 23 to I.C.C. A-11738, on page 2 thereof, in SECTION 1, EXCEPTIONS 6 and NOTE 2;

Minneapolis, St. Paul & Sault Ste. Marie Railroad Company:
Supplement 12 to I.C.C. 7490, on page 3 thereof, in Item 90-D in Rule 8, paragraph (d);

and all other schedules contained in each of the tariffs and supplements thereto named in this order, as well as all other tariffs, supplements and schedules not designated in this order, insofar as they contain the same provisions or provisions of the same import as these set forth in the aforementioned schedules.

And it further appearing, That upon consideration of the said schedules and protests thereto there is reason to believe that they would, if permitted to become effective, result in rules, regulations or practices which would be unjust and unreasonable in violation of the Interstate Commerce Act;

It is ordered, That an investigation be, and it is hereby, instituted into and concerning the lawfulness of the regulations contained in said schedules, with a view to making such findings and orders in the premise as the facts and circumstances shall warrant.

[fol. 183] *It is further ordered,* That the operation of the said schedules be and it hereby is suspended, and that the use thereof on interstate and foreign commerce be de-

ferred to and including June 1, 1959, unless otherwise ordered by this Commission.

It is further ordered, That the investigation in this proceeding shall not be confined to the matters and issues hereinbefore stated as the reason for instituting this investigation, but shall include all matters and issues with respect to the lawfulness of the said schedules under the Interstate Commerce Act.

It is further ordered, That neither the schedules hereby suspended nor those sought to be altered thereby shall be changed until this proceeding has been disposed of or until the period of suspension has expired, unless otherwise ordered by the Commission.

And it is further ordered, That a copy of this order be filed with the schedules in the office of the Interstate Commerce Commission, and that copies hereof be served upon the carriers parties to the said schedules and that the said carriers be, and they are hereby, made respondents to this proceeding.

By the Commission, Board of Suspension.

HAROLD D. McCOY
Secretary

(SEAL)

A true copy:

/s/ HAROLD D. McCOY
Secretary of the Interstate
Commerce Commission

[fol. 184] [COPY]

INTERSTATE COMMERCE COMMISSION

Washington 25

I, HAROLD D. McCOY, Secretary of the INTERSTATE COMMERCE COMMISSION, do hereby certify that the schedules hereto attached, and more particularly hereinafter described, are true copies of schedules filed with the said INTERSTATE COMMERCE COMMISSION on dates specified below, to wit:

Supplement 6 to Freight Tariff 4-D, Car Demurrage Rules and Charges, Storage Rules and Charges, H. R. Hinsch, Agent, I.C.C. 4808; said Supplement 6 having been filed October 7, 1958.

Supplement 20 to Freight Tariff 16641-Q, Chicago, Burlington & Quincy Railroad Company, also in Connection with Paducah & Illinois Railroad Company, Diversion or Reconsignment Tariff, I.C.C. 20458; said Supplement 20 having been filed October 20, 1958.

Supplement 4 to Freight Tariff 15800-M, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Diversion and Reconsignment Tariff I.C.C. B-7891; said Supplement 4 having been filed October 18, 1958.

Supplement 4 to Freight Tariff 16390-W, Chicago and North Western Railway Company, Diversion or Reconsignment Tariff I.C.C. 11362; said Supplement 4 having been filed October 13, 1958.

Supplement 2 to Freight Tariff 32017-R, Chicago, Rock Island and Pacific Railroad Company, Reconsignment Tariff I.C.C. C-13584; said Supplement 2 having been filed October 1, 1958.

Supplement 23 to Freight Tariff 13075-S, Illinois Central Railroad Company, I.C.C. A-11738; said Supplement 23 having been filed October 22, 1958.

Supplement 12 to Freight Tariff 226-R, Minneapolis, St. Paul & Sault Ste. Marie Railroad Company, Diversion or Reconsignment Tariff I.C.C. 7490; said Supplement 12 having been filed October 7, 1958.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the Seal of said Commission this 26th day of November, A. D., 1958.

(Signed) Harold D. McCoy
SECRETARY OF THE INTERSTATE COMMERCE COMMISSION

(SEAL)

[fol. 185]

Storage charges are subject to TARIFF OF INCREASED RATES AND CHARGES X-174-C, TRA-ER I. C. C. 4679 (Eleventh Series) and to Tariff of Increased Rates and Charges X-199-A, TRA-ER I. C. C. 4717 (Eleventh Series) and to Tariff of Increased Rates and Charges X-206-A, TRA-ER I. C. C. 4750 (Eleventh Series) and to Tariff of Increased Rates and Charges X-208-A, TRA-ER I. C. C. 4763 (Eleventh Series), and to supplements to or successive issues of said tariffs.

SUPPLEMENT

TO

C. T. C. 2351 I. C. C. 4808

(For State Commission Numbers, See Page 3)

SUPPLEMENT 6

TO

FREIGHT TARIFF 6-D

Supplements A (California intrastate traffic only), 5, 8 and 9 and the following special supplement contain all changes.
Supplement 1—Increase in Storage Charges—X-212.

H. B. HINSCH, Agent

NAMING

CAR DEMURRAGE RULES AND CHARGES

STORAGE RULES AND CHARGES

APPLYING AT

ALL POINTS ON RAILROADS PARTIES HERETO
(Except as otherwise provided herein)

This tariff is also applicable on interstate traffic except where expressly provided to the contrary in connection with particular items.

ISSUED OCTOBER 6, 1939 EFFECTIVE NOVEMBER 10, 1939

Issued by
H. B. HINSCH, Agent,
[illegible] W. Madison St.,
CHICAGO 2, ILL.

11 C C 649	NEW HAMPSHIRE P U C 71	R. I. P. U. A. 8
1 R C D 336	P S C N Y 390	TEXAS R. C. 1
P S C MD 86	OHIO P U C 3936	VT. P. S. C. 2
MASS D P U 73	PA P U C 646	V. C. C. 81
MINN R C 53		

SPECIAL NOTICE

This supplement makes no changes in the Demurrage and Storage Rules and Charges published in Tariff 4-D, except change in Item 175 to General Exceptions to Application of Demurrage Rules and Charges.

Section 1

GENERAL EXCEPTIONS TO APPLICATION OF DEMURRAGE RULES AND CHARGES

Item	Applicable at, or in Connection with	Exception
		Demurrage rules and charges, published herein, will not apply during months of November, December, January, February and March of each year on hopper bottom ore cars loaded with frozen ore or frozen rock Applicable only at Duluth, Minn., and points of origin subject to 5 rates in M. St. P. & S. S. M. R. R. Freight Tariff 177-J, I. C. C.
		Demurrage rules and charges, published herein, will not apply during months of December, January, February and March of each year on hopper bottom ore cars of this railroad loaded with coal or coke at the following Cuyuna Range stations: Crosby, Ironton and Riverton, Minn.
175-A Cancels 175	Minnesota, St. Paul & Sault Ste Marie Railroad Company	#On lumber and articles taking lumber rates or arbitraries over lumber rates moving under rates and routes provided in Trans-Continental Freight Bureau Tariffs 17-T, 18-Q and 28-P, TCFB ICC Nos 1361, 1380 and 1381, respectively, routed via Soo Line Railroad, (Minneapolis, St. Paul & Sault Ste. Marie Railroad Company) and stopped at Minneapolis, Superior or Rugby Junction, Wis., hereinafter referred to as "hold point," to "Hold for Orders," a free time allowance of not to exceed 15 days will be made at the hold point. The time will be computed from the date of notice of car or cars at the hold point At the expiration of the free time allowance herein provided the rules and charges otherwise named in this tariff will be applicable. The regulations governing the "Hold for Orders," privilege are published in Item 90 of Soo Line RR. Tariff 22b-R, ICC No. 7690 Expires with January 31, 1959 unless sooner cancelled, changed or extended.

AMEND explanation of abbreviations and technical terms shown on page 74 of tariff, as amended on page 12 of Supplement 3, by the addition of the following:

EXPLANATION OF ABBREVIATIONS AND TECHNICAL TERMS

Abbreviation	Explanation	Abbreviation	Explanation
TCFB	Trans-Continental Freight Bureau, Agent		

#Reissued

[fol. 187]

SUBJECT TO ITEMS X-175-B, X-196, X-206 AND X-212

SUPPLEMENT TO

Ill. CC 2313. Minn. R.C. 325 I.C.C. 20458

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY

ALSO IN CONNECTION WITH PADUCAH & ILLINOIS RAILROAD COMPANY

Supplement 20 to

FREIGHT TARIFF 16641-Q

Supplements 13,19 and 20 contain all changes.

Providing

RULES AND CHARGES

Governing

DIVERSION OR RECONSIGNMENT OF FREIGHT

and

HOLDING OF CARS FOR SURRENDER OF BILLS OF LADING OR WRITTEN ORDERS, OR FOR INSPECTION

at

STATIONS ON ABOVE NAMED LINES

DIVERSION OR RECONSIGNMENT TARIFF

ISSUED OCTOBER 17, 1958 EFFECTIVE NOVEMBER 20, 1958

Issued by
W. E. ALEXANDER, Chief of Tariff Bureau
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY
547 West Jackson Boulevard
Chicago 6, Illinois

(Filed ACDEFGIJKLMN)

2000

Supplement 20 to CB&Q Tariff 16641-Q

SECTION 1
MISCELLANEOUS RULES AND REGULATIONS

ITEM	SUBJECT	APPLICATION
115-A	EXCEPTIONS TO ASSESSMENT OF DIVERSION OR RECONSIGNMENT CHARGES.	No diversion or reconsignment charges will be made: (a) For a single diversion or reconsignment if order for such diversion or reconsignment is received by local freight agent at initial billing point in time to permit instructions to be given to yard employees before car leaves the yard at such initial billing point (See NOTE) (b) Where a change in route is made necessary by embargo placed against the billed destination or route thereto subsequent to acceptance of the car by carrier at point of origin. (c) Where all charges have been paid to billed destination and delivery accepted and a new bill of lading (not an exchange bill of lading) issued to a new destination on basis of the rate (not proportional, reshipping, or transshipping rate applicable on traffic originating beyond the new point of origin) applicable from the new point of origin shown in the new bill of lading, and without any carrier or agent of the carrier acting for the shipper. Such transaction will not be considered as a diversion or reconsignment under these rules. (d) When the combination of tariff rates applicable on a shipment terminating at and on a shipment originating at the point of diversion or reconsignment is applicable to the shipment. &(e) For one diversion or reconsignment on interstate carload shipments of lumber, or articles taking lumber rates or arbitraries over the lumber rates, while on the rails of the CB&Q. EXPIRES WITH DECEMBER 31, 1959, unless sooner cancelled, changed or extended. ② NOTE: For the purpose of applying the rules in this tariff, where cars originate at non-agency stations, the initial billing point will be considered the point of the shipment.

EXPLANATION OF REFERENCE MARKS

REFERENCE MARK		EXPLANATION
&	B	Reduction.
②	B	Not applicable on Kansas and Minnesota intrastate traffic.

B - Brought forward without change.

THE END

[fol. 189]

Subject to Increase in Rates and Charges as provided in Items X-206 and X-212

SUPPLEMENT

TO

I. C. C. B-7891

111.C.C.731
I.R.C.278
Minn.R.C.946

SUPPLEMENT 4

TO

C. M. St. P. & P. FREIGHT TARIFF 15800-M

Cancels Supplement 3

Supplements 1,2 and 4 contain all changes.

Chicago, Milwaukee, St. Paul and Pacific Railroad Company

SUPPLEMENT TO

LOCAL FREIGHT TARIFF

NAMING

RULES AND CHARGES

GOVERNING

DIVERSION or RECONSIGNMENT of FREIGHT

AND

HOLDING OF SHIPMENTS FOR SURRENDER OF BILLS OF LADING OR WRITTEN ORDERS,OR INSPECTION

AT STATIONS ON

CHICAGO,MILWAUKEE,ST.PAUL AND PACIFIC RAILROAD

ALSO

TERMINAL RULES,REGULATIONS AND CHARGES

ON

FRUITS AND VEGETABLES

AT

CHICAGO,ILL.

This tariff is also applicable on intrastate traffic,except where expressly provided to the contrary in individual items or charges.

DIVERSION AND RECONSIGNMENT TARIFF

ISSUED OCTOBER 15,1938. EFFECTIVE NOVEMBER 18,1938.

Issued by
F. J. SWIERENGA
Assistant General Freight Agent,
516 West Jackson Boulevard,
Chicago 6,Ill.

(D-3-8)
(2500) 6-W 51-642

5

SECTION 1
(See Page 7 of tariff for Application)

Item	SUBJECT	RULES AND CHARGES
T 62	ROUTING THROUGH NEWPORT, MINN. ON LUMBER	Rates applicable on carload shipments of lumber and related articles from and to points of origin and destination named in TCPB Tariffs 16-M,17-T,18-Q,27-W or 28-P, I.C.C. Nos 1580,1568,1589,1556 and 1581,respectively,Trans-Continental Freight Bureau, Agent,applying via Minneapolis Minnesota Transfer and St.Paul,Minn.,will also apply via Newport,Minn
.65-A	EXCEPTIONS	1.-Rules Nos.1 to 15,both inclusive (Items 70 to 140) and Rules Nos.16 and 17 (Items 1010 and 1015) including the items under captions "Application","Definitions" and "Conditions",will not apply on: (a) Not used. (b) Grain; Seeds (field or grass); Screenings from grain,unground,containing not more than five per cent (5%) of Flaxseed; Soybeans; Hay; Straw; Corn Husks or Corn Shucks,Pumices,unground and Alfalfa Meal,Carloads,held or stopped for inspection and disposition orders,except as provided in Rules 5 and 17 (Items 90 and 1015). (See Section 5). (c) Bananas; Berries,other than cold pack; Cantaloupes; Cocoanuts (but not including other edible nuts); Corn,fresh or green,other than cold pack; Cranberries; Fruits,fresh or green,other than cold pack; Melons; Pineapples; or Vegetables,fresh or green,other than cold pack,(including Potatoes and Onions). (See Section 4). (d) Coal,Coal Briquettes or Coke,(not including Carbon Coke,Creosote,Coke, Petroleum Carbon (Petroleum Coke),Pitch Coke or Tar Coke). (See Section 3). (e) Traffic moving entirely within switching limits on which no road-haul service is involved. (f) Carload shipments of Live Stock,on Interstate traffic or on Idaho,Missouri, North Dakota,South Dakota and Washington Intrastate traffic. (See Section 6). 2.-No Diversion or Reconsignment Charge will be made: (a) For a single diversion or reconsignment if order for such diversion or reconsignment is received by a local freight agent at initial billing point in time to permit instructions to be given to yard employees before car leaves the yard at such initial billing point. (See Note 1). (b) Not used. (c) Where a change in route is made necessary by embargo placed against the billed destination or route thereto subsequent to acceptance of the car by carrier at point of origin. (d) Where all charges have been paid to billed destination and delivery accepted and a new bill of lading (not an exchange bill of lading),issued to a new destination on basis of the rate (not proportional,reshipping or transshipping rate applicable on traffic originating beyond the new point of origin) applicable from the new points of origin shown in the new bill of lading,and without any carrier or agent of the carrier acting for the shipper. Such transaction will not be considered as a diversion or reconsignment under these rules. (e) On carload freight consigned to Minneapolis or St.Paul,Minn.,and ordered to same consignee at Minnesota Transfer,Minn. or New Brighton,Minn.,when orders are received before shipments reach billed destination. (f) On carload freight consigned to Minnesota Transfer,Minn. or New Brighton, Minn.,and ordered to same consignee at Minneapolis or St.Paul,Minn.,when orders are received before shipments reach billed destination. (g) On carload freight consigned to Hanford,Wash.,and ordered to same consignee at Hanford Works,Wash. 4 ÷ 3.-Carload shipments of lumber or articles taking lumber rates or arbitraries over the lumber rates will be permitted one diversion or reconsignment without charge while on the CNStP&P. 4 ÷ 4.-Carload shipments of lumber and articles taking lumber rates or arbitraries over lumber rates when billed to destinations on or via the CNStP&P under rates and routes provided in TCPB Tariffs 17-T,18-Q,27-W or 28-P,I.C.C. Nos. 1568,1589,1556 or 1581,via St.Paul,Minnesota or Council Bluffs,Iowa may be stopped at St.Paul,Minnesota or Council Bluffs,Iowa,as the case may be,to "hold for orders" at no charge. Notwithstanding the provisions of Agent H.R.Hinsch's Freight Tariff 4-D,I.C.C.4808 to the contrary the CNStP&P will hold such shipments at St.Paul,Minnesota or Council Bluffs,Iowa for not to exceed fifteen days (15) without the assessment of demurrage charges. The fifteen (15) day period will be computed from 11.59 P.M. of the day of arrival of shipment at "hold point". If such shipment is not reconsigned or diverted within the specified fifteen (15) day period,the rules,regulations and charges provided in Agent H.R.Hinsch's Freight Tariff 4-D,I.C.C.4808 will become applicable starting with 12:01 A.M. on the sixteenth (16th) day following arrival of car at the "hold point" and such charges will accrue for each calendar day car is held subsequent to the fifteenth (15th) day. Shipping order and waybill must show name and address of individual or firm to be advised of arrival of car at "hold point". On arrival of car at "hold point" the CNStP&P Railroad will notify the designated individual or firm of arrival of car and request disposition.

♦ Reduction.
: The provisions of Paragraphs 3 and 4 will expire with December 31,1959 unless sooner cancelled,changed or extended.
□ (With number enclosed) Reissued from Supplement bearing number enclosed within the square (See Item 35).

[fol. 191]

SUPPLEMENT TO

L.C.C. 1027 MINN.R.C. 465 I.C.C.11362

hicago and North Western Railway Company

SUPPLEMENT 4 TO

FREIGHT TARIFF 16390-W

Cancels Supplement 3
Supplements 1,2 and 4 contain all changes.

LOCAL FREIGHT TARIFF
NAMING
RULES AND CHARGES
GOVERNING

DIVERSION OR RECONSIGNMENT OF FREIGHT
AND
HOLDING OF SHIPMENTS FOR INSPECTION, SURRENDER OF BILLS OF LADING OR WRITTEN ORDERS

AT

STATIONS ON THE C.& N.W.

FOR INTRASTATE APPLICATION SEE ITEM 103

DIVERSION OR RECONSIGNMENT TARIFF

UED OCTOBER 10 1958.

EFFECTIVE NOVEMBER 12,1958.
(Except as noted)

ISSUED BY

A. H. HALLGREN,

Chief of Tariff Bureau,C.& N.W.Ry.Co.,

400 West Madison Street,

CHICAGO 6,ILL.

le (7654 T 4591 (2000) (E-6668-38955) Agents File in Compartment 2.

7

SECTION 1
GENERAL RULES

Item	SUBJECT
	EXCEPTIONS
	1.-Items 130 to 310 (Rules 1 to 17), including the items under captions "Application", "Condit and "Definitions" (Items 5, 10 and 15), will NOT apply, except as otherwise provided, on: (a) Not used. (b) Grain; Seeds (field or grass); Screenings from grain, unground, containing not more tha per cent of flaxseed; Soybeans; Hay; Straw; Corn Husks or Corn Shucks, Pummies, ungro and Alfalfa Meal; carloads, held or stopped for inspection and disposition orders, exce provided in Items 150 and 210 (Rules 5 and 17). (See Section 3). (c) Bananas; Berries, other than cold pack; Cantaloupes; Cocoanuts (but not including other edible nuts); Corn, fresh or green, other than cold pack; Cranberries; Fruits, fresh or green, other than cold pack; Melons; Pineapples; or Vegetables, fresh or green, other th cold pack (including Potatoes and Onions), when otherwise specifically provided in Rule 5. (d) Coal, Coal Briquettes or Coke (not including Carbon Coke, Creosote Coke, Petroleum Carbon Petroleum Coke, Pitch Coke or Tar Coke), when otherwise specifically provided in Section (e) Traffic moving entirely within switching limits on which no road-haul service is involv (f) Livestock, when otherwise specifically provided in Section 6. 2.-No diversion or reconsignment charge will be made (a) For a single diversion or reconsignment if order for such diversion or reconsignment i received by local freight agent at initial billing point in time to permit instructio to be given to yard employees before car leaves the yard at such initial billing poin (See Note 1). (b) Not used. (c) Where a change in route is made necessary by embargo placed against the billed destina or route thereto subsequent to acceptance of the car by carrier at point of origin. (d) Where all charges have been paid to billed destination and delivery accepted, and new bill of lading (not an exchange bill of lading) issued to a new destination on basis of th rate (not proportional, reshipping or trans shipping rate applicable on traffic origin beyond the new point of origin) applicable from the new point of origin shown in the n bill of lading, and without any carrier or agent of the carrier acting for the shipper 20-A Such transaction will not be considered as a diversion or reconsignment under these ru (e) Carload freight consigned to Minneapolis or St. Paul, Minn., and ordered to same consigne Minnesota Transfer or New Brighton, Minn., when orders are received before shipment rea billed destination. (f) Carload freight consigned to Minnesota Transfer or New Brighton, Minn., and ordered to sa consignee at Minneapolis or St. Paul, Minn., when orders are received before shipment rea billed destination. 3.-@Carload shipments of lumber, or articles taking lumber rates or arbitraries over the lumbe rates, while on the C&NW will be permitted one diversion or reconsignment without charge. No charg will be assessed for holding cars while awaiting disposition orders. (See Note 2)
	NOTE 1.-For the purpose of applying the rules in this tariff, when cars originate at non-agency s tions the initial billing point will be considered the point of origin of the shipment. NOTE 2.-Notwithstanding the provisions of Agent H.R.Hinsch's Freight Tariff 4-D, I.C.C.4802, to t contrary, in connection with the movement of cars of lumber, or articles taking lumber rates or arbitraries over the lumber rates, billed to destinations on or via the C&NW, the C&NW will, upo request, hold such cars at Spencer, Wis., Chelsea, Wis., Butterfield, Minn., Sioux City, Iowa, or Belle Plaine, Iowa, for not to exceed 15 days without the assessment of demurrage charges. The 15-day period will be computed from 11:30 P.M. of the day of arrival of shipment at "hold point." If s shipment is not reconsigned or diverted within the specified 15-day period, the rules, regulatio and charges provided in Agent H.R.Hinsch's Freight Tariff 4-D, I.C.C.4800 will become applicabl starting with 12:01 A.M. on the 16th day following arrival of car at the "hold point" and such charges will accrue for each calendar day car is held subsequent to the 15th day. Shipping ord and waybill must show name and address of individual or firm to be advised of arrival of car a "hold-point". On arrival of car at "hold point" the C&NW will notify the designated individual or firm of arrival of car and request disposition. @ Provisions of paragraph 3 will expire with December 31, 1959, unless sooner cancelled, changed o extended.

& Reduction.

Supplement 4 to C.& N.W. Tariff 16300-V

SECTION 1
GENERAL RULES

INDIRECT MOVEMENTS
(See also individual items of other sections of this tariff)

Item	APPLICATION
(C) 50-A	The following stations on the C&NW will be treated as intermediate stations as shown: Altoona,Wis.,same as Eau Claire,Wis. Aurora,Ill.,same as Geneva,Ill. Bayport,Minn.,same as Hudson,Wis. Belvidere,Ill.,same as De Kalb,Ill. Black River Falls,Wis.,same as Levis,Wis. Burkhardt,Wis.,same as Northline,Wis. ⊙California Jct.,Iowa,same as Missouri Valley,Iowa. Chippewa Falls,Wis.,same as Eau Claire, Wis. ⊙Council Bluffs,Iowa,same as Missouri Valley or California Jct.,Iowa. ⊙Crescent,Iowa,same as Missouri Valley, Iowa. ⊙Des Moines,Iowa,same as Ames,Iowa. Elgin,Ill.,same as West Chicago or Crystal Lake,Ill. Freeport,Ill.,same as De Kalb or Harvard, Ill. ⊙Honey Creek,Iowa,same as Missouri Valley, Iowa. La Crosse,Wis.,same as Medary,Wis. ⊙Lincoln,Neb.,same as Fremont,Neb. ⊙Loveland,Iowa,same as Missouri Valley,Iowa. ⊙Lyons,Iowa,same as Clinton,Iowa. Marshfield,Wis.,same as Merrillan,Wis. Menomonie,Wis.,same as Menomonie Jct.,Wis. Minneapolis,Minn.,same as St.Paul,Minn. Minnesota Transfer,Minn.,same as St.Paul, Minn. New Richmond,Wis.,same as Northline,Wis. Omaha,Neb.,same as Blair,Neb.,or California Jct.,Iowa. Peoria,Ill.,same as Nelson,Ill. Rockford,Ill.,same as De Kalb or Harvard, Ill. St.Charles,Ill.,same as Geneva,Ill. ⊙Sioux City,Iowa,same as California Jct., Iowa. South Omaha,Neb.,same as Blair,Neb. Sterling (Rock Falls),Ill.,same as Nelson, Ill. Sycamore,Ill.,same as De Kalb,Ill. Stillwater,Minn.,same as Hudson,Wis. Minneapolis,Minnesota Transfer and St.Paul will be considered as intermediate between Duluth, Minn.,and Superior,Wis.,and Elroy,Wyeville and Marshfield,Wis.,or points beyond via those junctions. ⊙Minneapolis and Minnesota Transfer,Minn.,will be considered intermediate to St.Paul,Minn.
	⊙ Applies on interstate traffic only.

☐ (With number enclosed).-Reissued from supplement bearing the number enclosed within the square. (See Item 108).

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[fol. 194]

Subject to Items X-206 and X-212 Series

SUPPLEMENT

TO

ILL.C.C.967 | MINN.R.C.435 | I.C.C. C-13584

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY

SUPPLEMENT 2
(Supplements 1 and 2 include all changes)

To

FREIGHT TARIFF 32017-R

PROVIDING

RULES AND CHARGES

GOVERNING

DIVERSION OR RECONSIGNMENT OF FREIGHT

AND

HOLDING OF CARS FOR SURRENDER OF BILLS OF

LADING OR WRITTEN ORDERS, OR INSPECTION

ALSO

RULES AND CHARGES APPLY ON GRAIN, GRAIN SCREENINGS, SOYBEANS, SEED (Field or Grass), HAY, STRAW, CORN HUSKS OR CORN SHUCKS, FODDER AND ALFALFA MEAL, CARLOADS, HELD FOR INSPECTION AND DISPOSITION ORDERS

AT

STATIONS ON C.R.I.& P.

RECONSIGNMENT TARIFF

For Interstate Application See Item 82 Series.

ISSUED SEPTEMBER 30, 1958. | EFFECTIVE NOVEMBER 2, 1958.

Issued by

W. J. STERN,

C.T.E., C.R.I.& P.R.R.,

La Salle Street Station,

CHICAGO 5, ILL.

(N.R.R.) (Ark., Colo., Iowa, Kas., La., Neb., No., N.M., Okla., S.D., Tex.) (E-36881) Supp. 2 to C.R.I.& P. Tariff 32017-R.

10

Supplement 2 to C.R.I.& P. Freight Tariff 32017-E

SECTION 1

RULES AND CHARGES GOVERNING DIVERSION OR RECONSIGNMENT OF FREIGHT AS PROVIDED IN ITEM 200 SERIES

Item	SUBJECT	RULES AND CHARGES
4359	EXCEPTIONS	Carload shipments of lumber,articles taking lumber rates or arbitraries over the lumber rates,on which the rates in TCPA Tariffs 17-T,18-Q,27-W or 28-P,Agent W.J. Prueter's I.C.C.Nos.1568,1569,1586 or 1581 are applicable over routes in connection with the C.R.I.& P. Railroad via Inver Grove,Minnesota or Belleville,Kansas,as the case may be,when billed to Inver Grove,Minnesota or Belleville,Kansas to "Hold for Orders," may be diverted or reconsigned therefrom to points beyond. The charge for such diversion or reconsignment will be as provided in this tariff and as amended. All other tariff rules and regulations applicable to such shipments must be observed (See Note). NOTE.-Notwithstanding the provisions of Agent Hinsch's Freight Tariff 4-B,I.C.C. 4808,to the contrary,the C.R.I.& P. Railroad will hold such shipments at Inver Grove,Minnesota or Belleville,Kansas for not to exceed fifteen (15) days without the assessment of demurrage charges. The fifteen (15) day period will be computed from 11:59 P.M. of the day of arrival of shipment at "hold point." If such shipment is not reconsigned or diverted within the specified fifteen (15) day period,the rules,regulations and charges provided in H.R.Hinsch's Freight Tariff 4-B I.C.C. No.4808 will become applicable starting with 12:01 A.M. on the sixteenth (16th) day following arrival of car at the "hold point" and such charges will accrue for each calendar day car is held subsequent to the fifteenth (15th) day. Shipping order and waybill must show name and address of individual or firm to be advised of arrival of car at "hold point." On arrival of car at "hold point" the C.R.I.& P. Railroad will notify the designated individual or firm of arrival of car and request disposition. The provisions of this item will expire with December 31,1950 unless sooner cancelled,changed or extended.

6 Rebertus.

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[fol. 196]

SUBJECT TO ITEMS I-260 AND I-313-A

Rates and Charges in this supplement are NOT subject, except as otherwise provided, to Tariffs of Increased Rates and Charges I-175-C and I-195-A, Western Trunk Line Committee, Agent, I.C.C.A-4066 and A-4148 (Frontier service).

SUPPLEMENT TO

ILL.C.C.A-1774
I.R.C.A-705
M.R.C.224
K.R.C.148

I.C.C.A-11738

Illinois Central Railroad Company

1

U. P. R. R.
Freight Accounts Office
NOV 6 1958
Omaha, Nebraska

Supplement 23

To

FREIGHT TARIFF 13075-S

(Cancels Supplement 22)
Supplements 17,18,23 and following special supplement contains all changes:
Supplement 10 (Increased Rates and Charges I-196)

- OF -

RULES AND CHARGES

Governing

DIVERSION AND RECONSIGNMENT

- AND -

Holding of Shipments for Surrender of Bills of Lading or Written Orders or Inspection

- OF -

FREIGHT

- AT -

Stations on

ILLINOIS CENTRAL RAILROAD
(Will not apply on Coal, Coal Briquettes, or Coke)

ISSUED OCTOBER 21, 1958.

EFFECTIVE NOVEMBER 22, 1958
(Except as otherwise indicated herein)

Issued by
A. A. KOCH,
General Freight Agent,
135 East Eleventh Place
CHICAGO 5, ILL.

(17(a))

Supplement 23 to I C Tariff 13075-B

22 ITEM X-206 Cancels Item 206

Except as otherwise provided in connection with particular rates or charges,rates and charges in I C C 13738 IC Tariff 13075-B and as amended,are subject to Tariff of Increased Rates and Charges X-206-A, Western Trunk Line Committee,Agent I C C A-4211 (Prueter series) supplements thereto or successive issues thereof (On intrastate traffic subject to the extent authorized by letter-number supplements to said tariff)

The form of this publication is authorized under permission of the Interstate Commerce Commission 71234 as amended,August 6,1957

22 ITEM X-212-A Cancels Item 212

The rates and charges in IC Tariff 13075-B,I.C.C A-11738,and as amended,are hereby increased as provided in Item 130 of Tariff of Increased Rates and Charges X-212,Western Trunk Line Committee,Agent I.C.C A-4218 (Prueter series) supplements thereto or successive issues thereof

The provisions of this item will not apply on intrastate traffic moving between points in,and transported wholly within any state,nor to rates or charges on intrastate traffic until authorized by a letter-number supplement to Tariff of Increased Rates and Charges X-213 referred to above.

The form of this item is permitted by authority of Interstate Commerce Commission Permission No.75100 of December 23,1957,as amended.

SECTION 1--GENERAL RULES
EXCEPTIONS

22 2 -NO DIVERSION OR RECONSIGNING CHARGE WILL BE MADE:
(i) For changing the destination of shipments from Laurel,Miss.,to Shows Field,Miss.,when shipments are billed to Laurel,Miss.,but are consigned to parties located at Shows Field,Miss.,and delivery at that point is required. Not subject to Item 5 of tariff,as amended. Expires with December 31,1958,unless sooner cancelled,changed or extended.

(k) For changing the destination of shipments from Memphis,Tenn. to Woodstock,Tenn.,when shipments are billed to Memphis,Tenn ,but are consigned to Butler Brothers,4185 Steele Road and delivery at Woodstock, Tenn. is required. Not subject to Item 5 of tariff,as amended. Expires with December 31,1958,unless sooner cancelled,changed or extended.

(l) For changing the destination of shipments from Monroe,La. to Sharps or Bruard,La.,when shipments are billed to Monroe,La.,but are consigned to Sharps or Bruard,La. and delivery at Sharps or Bruard is required. Not subject to Item 5 of tariff,as amended.

6 (D) 6 (New) Carload shipments of lumber,or articles taking lumber rates or arbitraries over lumber rates, while on IC at stations north of the Ohio River and west of the Illinois-Indiana State Line will be permitted one diversion or reconsignment without charge. No charge will be assessed for holding cars while awaiting disposition orders (See Note 2).

NOTE 2.-Not withstanding the provisions of CTRTB Tariff 4-D,I.C.C.4808,(Bismch's series),to the contrary, in connection with the movement of cars of lumber or articles taking lumber rates or arbitraries over the lumber rates,billed to Council Bluffs,Sioux City,Waterloo,Iowa or Prosport,Ill.,for not to exceed 15 days without the assessment of demurrage charges. The 15-day period will be computed from 11:30 P M. of the day of arrival of shipment at "hold point". If such shipment is not reconsigned or diverted within the specified 15-day period,the rules,regulations and charges provided in CTRTB Tariff 4-D,I.C.C.4808 (Bismch's series) will become applicable starting with 12:01 A.M. on the 16th day following arrival of car at "hold point" and such charges will accrue for each calendar day car is held subsequent to the 15th day. Shipping order and waybill must show name and address of individual or firm to be advised of arrival of car at "hold point". On arrival of car at "hold point" the IC will notify the designated individual or firm of arrival of car and request disposition.

SECTION 2
RULES AND CHARGES GOVERNING (1) COTTONSEED MEAL, GRAIN, SCREENINGS FROM GRAIN, SCREENED, CONTAINING NOT MORE THAN 5 PER CENT OF FLAXSEED, SEED (FIELD), SEED (GRASS), SOYBEANS, HAY, STRAW, CORN HUSKS, CORN SHUCKS, PUNCHES, UNGROUND, ALFALFA MEAL, CARLOADS, HELD IN CARS ON TRACK FOR PRIVILEGE OF NATIONAL, STATE, BOARD OF TRADE OR OTHER OFFICIAL INSPECTION AT BILLED DESTINATION OR POINTS INTERMEDIATE THEREOF

Carload shipments,reconsigned and not actually inspected will be subject to rules and charges as provided in Section 1.
Traffic moving entirely within switching limits on which no road haul service is involved,is not subject to the rules provided herein.

SECTION 3 APPLICATION OF ITEMS 80 TO 86, INCLUSIVE

APPLICABLE,EXCEPT AS OTHERWISE PROVIDED AT ALL STATIONS IN STATES OF ILLINOIS, INDIANA, IOWA, MINNESOTA, NEBRASKA, SOUTH DAKOTA AND WISCONSIN; ALSO BIRMINGHAM, ALA., HENDERSON, LOUISVILLE, OWENSBORO, PADUCAH, KY., MEMPHIS, TENN., MERIDIAN, MISS., ARK., GREENVILLE, LELAND, VICKSBURG, NATCHEZ, MERIDIAN, MISS., BATON ROUGE, NEW ORLEANS, AND SHREVEPORT, LA.

For explanation of reference marks,see last page.

Supplement 33 to I.C.Tariff 13075-B

SECTION 3

Item	SUBJECT	APPLICATION		
		(a) Grain,Screenings from Grain,unground (containing not more than 5 per cent of flaxseed),Seeds (Field or Grass),Soybeans,Hay,Straw,Corn Stalks,Corn Shucks,Pumice, unground,Alfalfa Meal or (D) Cottonseed Meal,Carloads,will be placed on hold tracks of Illinois Central Railroad at Agency stations only,and notice of location of hold tracks on which cars are placed sent to consignee,or posted on bulletin board,where such practice is in vogue,for purpose of inspection (see Note 1),and held on such tracks or other tracks for disposition orders at either billed destination or a point directly intermediate thereto (b) The following charges will apply upon cars placed and held as provided in paragraph (a).		
		WHEN DISPOSITION ORDER IS RECEIVED,OR	CHARGES PER CAR For first stop for inspection (See Note 3 and Exception below)	For each subsequent stop for inspection (See Note 3 and Exception below)
		(A) Grain,Screenings from Grain,unground (containing not more than 5% of flaxseed), Seeds (Field or Grass),Soybeans,(D) Cottonseed Meal: 1.-Prior to expiration of free time provided for in Agent S.B.Branch's National Car Demurrage Rules and Charges Tariff 6-B,I.C.C.4000. 2.-After expiration of free time as described in 1.	No Charge See Note 5	{See Note 2 See Note 4 See Note 5
		(B) Hay,Straw,Corn Husks,Corn Shucks,and Pumice,unground,Alfalfa Meal. (See Note 2).	See Note 5.	See Note 5
(D) Cancels 50-C Cancelled on next page	RULES APPLICABLE ON GRAIN, etc.	(c) Former contents of this paragraph transferred to paragraph (B) EXCEPTION.-Cars placed on track for inspection and held for disposition and charges incident thereto. When a disposition order has been received ordering a car to a location within the switching limits and the car has been moved in execution of the order,and a subsequent diversion or reconsigning order is received while car is on carrier's tracks or in movement within the switching limits or after placement,ordering car for shipment to a point outside the switching limits or to another location within the switching limits,charges shown in Item 430,page 38 of tariff,as amended,will be made for such reconsignment or diversion,except that when a car is diverted or reconsigned after placement to another location within the switching limits no charge will be made for such diversion or reconsignment but the shipment will be subject to the rate or charge for local movement within the switching limits If an order to reconsign by the carrier and changed or cancelled by the consignor, consignee or owner before the car has been moved in execution of the order,it will not constitute a diversion or reconsignment order under these rules and only the order governing and charge applicable to the subsequent order under which the car is moved will be applied. (d) A "disposition order" on a car held for or by consignors after arrival means a specific order for each individual car showing number and initials,given to carrier in writing or to be confirmed in writing after inspection of car has been made,which authorizes: (a) Immediate tender of car for unloading at station where inspection was made, OR (b) The immediate forwarding of a car to a connecting line or to another destination. An order which does not conform to these requirements will not be accepted nor become effective. The disposition order will be considered in lieu of the consignment instructions under which the car arrived at inspection point. When a car,in accordance with billing instructions,is stopped for inspection at a point intermediate to the billed destination via authorized routes,and the carrier's agent is notified in writing,or such notice is confirmed in writing,that the inspection has been completed,and no change in billing is requested,such car will be forwarded to the billed destination in accordance with original consignment instructions. If a disposition order received by the carrier is changed or cancelled by the consignor,consignee or owner before the car has been moved in execution of the order,such order will not constitute a disposition order under these rules and only the order governing and the charge applicable to disposition order under which the car is moved will be applied. On shipments consigned "to order" an order to divert or reconsign,or a disposition order,under these rules will not be accepted or become effective until the original bill of lading is surrendered for cancellation,endorsement of diversion or reconsignment,or exchange,or in its absence the property may be diverted or reconsigned or a disposition order will be accepted and become effective in advance of the surrender of the bill of lading only under the provisions of Rule 7 of Southern Classification 84 ICC 113 (Carmen series) Southern Classification Committee,Agent.		

For explanation of reference marks,see last page.

[fol. 199]

SECTION 4

		APPLICATION
22 50-I Canada 50-K (Concluded)	RULES APPLICABLE ON GRAIN, etc	(1) APPLICATION 1. Grain (including Soybeans),carloads,from Cairo,East St.Louis,Ill.,St.Louis,Mo.,and [illegible] (other originating beyond) arriving at New Orleans,La.,via IC and [illegible] shipped at New Orleans,La., for inspection and is subsequently reconsigned [illegible] stations in the State of Florida (except Pensacola,Jacksonville,Miami or Tampa). [illegible] to or from the line of the L&N,east of Pensacola to Chattahoochee,Fla.,thence [illegible] to Jacksonville,Fla.,will be subject to stop charge of 2½ cents per 100 pounds, [illegible] charge will accrue to the IC. (2) EXCEPTION 2. Grain (including Soybeans),carloads,from IC stations,indexed,in- clusive,via (See Note 6) 330 Aetna,Ill. to 385 Kinmundy,Ill., 708 Bethel,Ill. to 709 Greendale,Ill., 2085 Shannon,Ill. to 2130 Woodrow,Ill., 2685 Jacob,Ill. to 2565 West Salem,Ill., and 2685 Dieterich,Ill. to 2695 Lee,Ill.,arriving at Decatur,Ill., via IC,and which is stopped at Decatur,Ill.,for inspection,may be subsequently re- consigned to New Orleans,La.,or Gulfport,Miss.,for export on basis of through rate from origin,subject to the Decatur,Ill. rate to destination as a minimum,without charge for back or out-of-line haul. NOTE 1.-The inspection as referred to in: (a) On Grain,Screenings from grain,unground,(containing not more than 8 per cent of flaxseed) Seeds (field or grass),or Soybeans,or ① Cottonseed Meal,the taking of representative sample or samples by,and establishing the official grade of the contents of the car by,competent and impartial authority independent of both vendor and vendee and only in accordance with National,State,Board of Trade or Grain Ex- change authorizations or requirements. (b) On Hay,Straw,Corn Stalks,Cane Stalks,Pumice,unground,Alfalfa Meal,such as may be necessary or desired. NOTE 2.-No charge for the stop for inspection will be made on shipments of Hay, Straw,Corn Stalks,Cane Stalks and Pumice,unground,Alfalfa Meal when the combination of tariff rates applicable on a shipment terminating at,and on a shipment originat- ing at,the point of inspection,is charged. NOTE 3. The number of stops for inspection shall be reckoned from the point of the loading of a car to the destination at which is unloaded. NOTE 4.-(a) Cars inspected and subsequently unloaded within the switching limits of the station (see "Σ") at which the inspection is made will not be subject to the charge provided in Note 3. (b) Under this note,the following stations,as grouped,will be treated as one station,provided however,that the rate to point of inspection or point of un- loading,whichever is higher,will apply (see "①"): Group 1-St.Louis,Mo. and East St.Louis,Ill. Group 2-Points in the Peoria-Pekin,Ill. Switching District as defined in Illinois Freight Association,Agent,Tariff 41-I,I.C.C.No.886. (Branch series) Group 3-Omaha,South Omaha,Neb. and Council Bluffs,Iowa. NOTE 5.-Where reference is made to this note and stopping for inspection is authorized,following charges per car will apply on cars stopped for inspection purposes in: Iowa,except Dubuque on Interstate traffic; Minnesota; Nebraska and South Dakota. . . . . $8.17 Birmingham,Ala.; Baton Rouge,La.; Bridgeport,Ala.; Helena,Ark.; Owensboro,Ky.; ① New Orleans,La.; Greenville,Miss.; Leland,Meridian,Miss.; ① New Orleans,La., Greenville,Miss.; Leland,Meridian,Miss. . . . . $8.32 Natchez,Miss., and Vicksburg,Miss . . . . . $8.47 Illinois, Indiana, ① Dubuque,Iowa; Chiles,Henderson,Louisville and Paducah,Ky.; and Wisconsin. . . . . $8.62 ◇Baton Rouge,La.; and ◇New Orleans,La. . . . . $8.62 Shreveport,La. . . . . ($8.32 (◇$8.47 Memphis,Tenn . . . . . (◇$8.97 NOTE 6.-For list of stations refer to Station List Publishing Company,Agent, Official List of Open and Propay Stations No.73,I.C.C.No.A-36. (Leland series).

Amends Page 12 of Supplement 17 of Page 4 of Supplement 18-A.

② APPLICATION OF ITEMS 60-A TO 63-A,INCLUSIVE

The provisions of Items 60-A to 63-A inclusive are applicable,except as otherwise provided,at all sta- tions in states of Alabama (except Birmingham),Kentucky (except Henderson,Louisville,Owensboro and Paducah) Louisiana (except Baton Rouge and New Orleans and Shreveport),Mississippi (except Greenville,Leland, Natchez,Meridian and Vicksburg),and Tennessee (except Memphis).

◇ Reduction.
△ Change in wording that results in neither increases nor reductions in charges.
◆ Applicable only on intrastate traffic.
◆ Applicable only on interstate traffic.
① Applicable at Memphis,Tenn. only.
② Under this item all points,locations,stations,towns or cities on all lines within the corporate limits or the switching limits of each billed destination will be considered one station.
③ Expires with December 31,1950 unless sooner cancelled,changed or extended.
④ Applicable only at stations in Illinois,Iowa,Minnesota,Nebraska,South Dakota and Wisconsin.
⑤ Subject to Tariff of Increased Rates and Charges I-120-A,Southern Freight Association,Agent,I.C.C.- 1134.

Subject to Increases in Rates and Charges provided in Items N-175, N-196, N-206 and N-215 or successive issues thereof.

(REDUCTION)
(REISSUE)
(CHANGE)

Supplement to

C. P. Ry., C. T. C. W-4227

Ill. C. C. 535 Minn. R. C. 755 I. C. C. 7490

Supplement 12 to

SOO LINE RR FREIGHT TARIFF 226-R

Cancels Supplements 8, 10 and 11
Supplements 9 and 12 contain all current changes

Minneapolis, St. Paul & Sault Ste. Marie Railroad Company

— — — IN CONNECTION WITH — — —

CANADIAN PACIFIC RAILWAY COMPANY (LINES PORT ARTHUR, ONT., AND WEST THEREOF)
(FX 3, NO. 228)

C. P. RY., FREIGHT TARIFF W-355-A

JOINT TARIFF

—OF—

RULES AND CHARGES GOVERNING THE

DIVERSION OR RECONSIGNMENT OF FREIGHT

AND HOLDING OF CARS FOR SURRENDER OF BILLS OF LADING OR WRITTEN ORDERS, OR INSPECTION

AT ALL STATIONS

—ON—

SOO LINE RAILROAD

As shown in Official List of Open and Prepay Stations 73, I. C. C. A-38, Ill. C. C. A-38, Minn. R. C. A-38, Station List Publishing Company, Agent.

—ALSO AT—

WINNIPEG, MAN.

As shown in Item 195 of tariff

—ALSO—

Terminal Rules, Regulations and Charges at Chicago, Ill.

For Intrastate Application, See Item 13.

DIVERSION OR RECONSIGNMENT TARIFF

ISSUED OCTOBER 6, 1958 EFFECTIVE NOVEMBER 10, 1958

T. HOOKS,
Freight Traffic Manager, CP Ry.,
WINNIPEG, MAN.

Issued by
J. T. ANDERSON,
Chief of Tariff Bureau,
Soo Line RR
Plant National-Soo Line Bldg.
MINNEAPOLIS 40, MINN.

(R.M.O.-1200-8-58707) Printed in U. S. A.)

Supplement 12 to Soo Line RR. Freight Tariff 220-R

INCREASE IN RATES AND CHARGES

Except as otherwise provided in connection with particular rates and charges, rates and charges in this tariff, X-175 and its supplements thereto are subject to **Tariff of Increased Rates and Charges X-175C**, Agent W. J. Prueter's A [illegible] C. C. A-1098, C. T. C. A-1147, Ill. C. C. 111, Minn. R. C. 432.

Except as otherwise provided in connection with particular rates and charges and except as otherwise provided below, rates and charges in this tariff, and in supplements thereto, are subject to Tariff of Increased Rates and Charges X-280-A, I. C. C. A-1211, C. T. C. A-1160, Ill. C. C. 432, Minn. R. C. 459, Western Trunk Line Committee Agent supplements thereto or successive issues thereof.

Exception The provisions of this item will not apply:

a. On Intrastate traffic moving between points in, and transported wholly within any state, nor to rates or charges on Intrastate traffic; nor

b. On Interstate traffic via an Interstate route on a given Interstate shipment moving between points in any state between which points there is an Intrastate rate of the same amount applicable on a like X-280-A shipment via any route wholly within the same state in any tariff on file with the Interstate Commerce Commission nor to rates or charges applicable in connection with said Interstate shipment until authorized by letter-number (e.g., K-1, K-2, etc.) supplements to Tariff of Increased Rates and Charges X-280-A referred to above, which shall specify the increases applicable to such rates and charges, and which shall be filed with the Interstate Commerce Commission and State Commissions.

The term of this publication is permitted by authority of Interstate Commerce Commission, Permission No. [illegible] as extended August 6, 1957 and Board of Transport Commissioners for Canada Special Permission No. [illegible] of August 6, 1957.

Except as otherwise provided in connection with particular rates and charges and except as otherwise provided below, rates and charges in this tariff, and in supplements thereto are subject to Tariff of Increased Rates and Charges X-212, I. C. C. A-1218, C. T. C. A-1161, Ill. C. C. 433, Minn. R. C. 460, Western Trunk Line Committee Agent supplements thereto or successive issues thereof.

Exception The provisions of this item will not apply:

a. On Intrastate traffic moving between points in, and transported wholly within any state, nor to rates or charges on Intrastate traffic; nor

b. On Interstate traffic via an Interstate route on a given Interstate shipment moving between points X-212 in any state between which points there is an Intrastate rate of the same amount applicable on a A like shipment via any route wholly within the same state in any tariff on file with the Interstate Commerce Commission nor to rates or charges applicable in connection with said Interstate shipment until authorized by letter-number (e.g., K-1, K-2, etc.), supplements to Tariff of Increased Rates and Charges X-212 referred to above, which shall specify the increases applicable to such rates and charges, and which shall be filed with the Interstate Commerce Commission and State Commissions.

The term of this publication is permitted by authority of the Interstate Commerce Commission Permission No. [illegible] of December 23, 1957, as amended February 11, 1958 and Board of Transport Commissioners for Canada Special Permission No. 5912 of February 13, 1958.

ITEM 3 EXPIRATION DATE

Applicable only when specific reference is made hereto.

Provisions making reference to this Item expire as indicated below, unless sooner cancelled, changed or extended [illegible] paragraph (a) thereof, is revised thus: "[illegible] with January 31, 1959.

ITEM 11 METHOD OF DENOTING REISSUED MATTER IN SUPPLEMENTS

Matter brought forward without change from one supplement to another will be designated as "Reissued" by a reference mark in the form of a square enclosing a number, the number being that of the supplement in which the reissued matter first appeared in its currently effective form. To determine its original effective date, consult the supplement in which the reissued matter first became effective.

For explanation of reference marks, see last page of this supplement.
For explanation of abbreviations, see last page of tariff.

SECTION 1

Diversion or Reconsignment Rules and Charges Governing Freight Other Than as Shown in Sections 2, 3 and 4.

Item	SUBJECT	RULES AND CHARGES
	Rule 8 (a) 1) Stopping in Transit.	(a) Except as otherwise provided in Rule 5, Item 75, if, on request of consignor, consignee or owner, a car is stopped for orders for the purpose of delivery or diversion or reconsignment or reforwarding prior to the arrival at original billed destination, **a charge of** (a) **$5.40, (b) $5.13, or $4.90 per car** will be made for such service and the point where the car is stopped will be considered the original destination of the freight, and notice of arrival will be sent, or given, to the party (at the post office address designated by him) on whose order car is held. If the car is subsequently forwarded from point at which held, the provisions of Rules 10, 11 and or 13, Items 100, 105 and or 120, as the case may be, will also be applied. The service of stopping as provided in this rule makes the stop point the original destination and the provisions of Rule 5 (Item 75) will be applicable to the same extent as if car were originally billed to the stop point as the destination, except that when car is subsequently reforwarded from point at which stopped to the original billed destination one additional change in destination under the provisions of Rule 5 (Item 75) will be permitted. (b) If, after arrival at billed destination, car is withheld from placement on request of consignor, consignee or owner, **no charge will be made** for such service and notice of arrival will be sent, or given, to the party (at the post office address designated by him) on whose order the car is held. If the car is subsequently placed for unloading at or is forwarded from the point at which held, the provisions of Rules 10, 11 and or 13 (Items 100, 105 and or 120, as the case may be, will also be applied. The provisions of this rule do not preclude a change in destination under the provisions of Rule 5 (Item 75). (See Note.) **Note.** Rule 8 (b) does not apply to a car held under constructive placement, as defined in Rule 5 Section 2 of Agent H. R. Hunsche's Tariff I-D, I. C. C. 1808, III. C. C. 696, Minn. R. C. 63, for delivery on an other than public delivery track.
	(c) Diversion or Reconsignment.	(c) If a car is stopped or held without specific instructions from the consignor, consignee or owner, for the purpose of effecting diversion or reconsignment orders, at any point intermediate to the destination to which the car is consigned, **no charge will be made** for the stop, but the point at which car is stopped or held will be considered as the destination of the car and any diversion or reconsignment effected at the request of consignor, consignee or owner will be made under the provisions of Rules 10, 11, 12 and or 13, Items 100, 105, 110 and or 115, as the case may be, except that if the consignor, consignee or owner request that the car be forwarded over the same route and to the same consignee and destination as originally billed, and it is actually so forwarded, such forwarding will not be considered as a diversion or reconsignment under these rules.
		(d) Lumber and articles taking lumber rates or arbitraries over lumber rates moving under rates and routes provided in Trans-Continental Freight Bureau Freight Tariffs 17-T, 18-G and 28-P, I. C. C. Nos. 1580, 1580 and 1581, respectively, Trans-Continental Freight Bureau, Agent, routed via Soo Line Railroad, may be stopped at Minneapolis, Minnesota, Superior or Rugby Junction, Wisconsin, hereinafter referred to as "hold points," for Orders at **no charge.** A free time allowance of not to exceed 15 days will be made at the hold point as provided in Item 175 of Agent H. R. Hunsche's Car Demurrage Rules and Charges Freight Tariff I-D, I. C. C. 1808. The time will be computed from the date of arrival of car or cars at the hold point. At the expiration of the free time allowance, the rules and charges otherwise named in Agent H. R. Hunsche's Freight Tariff I-D, I. C. C. 1808, will be applicable. Shipping order and waybill must show name and address of individual or firm to be advised of arrival of car at hold point. On arrival of car at such hold point, the Freight Service Manager of the Soo Line RR. at Minneapolis, Minnesota, will notify such individual or firm of arrival of car and request disposition. Instructions as to further move from the hold point must be addressed to Freight Service Manager, Soo Line RR., Minneapolis, Minnesota. The charge for the diversion will be assessed in accordance with provisions of Soo Line RR. Freight Tariff 220-R, I. C. C. 7080. Only one stop in the United States will be permitted under the provisions of paragraph (d). The provisions of paragraph (d) will not apply when final destination of the car is in Canada.

For explanation of reference marks see last page of this supplement.
For explanation of abbreviations, see last page of tariff.

SECTION 1—Continued

Diversion or Reconsignment Rules and Charges Governing Freight Other Than as Shown in Sections 2, 3 and 4.

Item	SUBJECT	RULES AND CHARGES
		If a car has been placed for unloading at original billed destination and is forwarded therefrom without being unloaded to a point outside of the switching limits, it will be subject to the published tariff rates applicable on a shipment terminating at and on a shipment originating at the point of diversion or reconsignment (See Exceptions 1, 2, 3, 4 and 5).
		Exception 1—If a car has been placed for unloading on a public delivery track, but has not been unloaded or accepted by consignee or owner, it will be considered as not having been placed for unloading and will be subject to the provisions of Rule 10, Item 100.
		Exception 2:
		(a) This is not intended to prevent the application of proportional, reshipping or transshipping rates on Grain; Grain Products; Screenings from grain, unground containing not more than 5 per cent of flaxseed, or Soybeans, diverted or reconsigned from tracks of consignees or shippers, but a charge of (-) $15.11, (*) $14.38, (+) $13.07 per car will be made in such cases.
		(b) @Grain, originally billed to a point at which storage in transit is authorized, may be reconsigned to points beyond, subject to charges computed on basis of the through carload rate and transit charges, if any, which would have applied on the original commodity had the shipment actually been stopped and stored in transit plus (*) $14.38, (+) $13.07 per car.
	Rule 12	
	Diversion or Reconsignment to Points Outside Switching Limits After Placement.	**Exception 3**—On Anhydrous Ammonia, Petroleum and Petroleum Products, Amyl Acetate, Butyl Acetate, Ethyl Acetate, Ethyl Ether (Sulphuric), other than Anesthetic, Isopropyl Methyl Acetate, Propyl Acetate; Acetone, Alcohol other than alcoholic liquors, viz.: Amyl Alcohol, Butyl Alcohol, Diacetone Alcohol, Propyl Alcohol, Methyl Ketone, Ethyl ketone, Methyl Propyl Ketone, Methanol (methyl alcohol), **in tank cars**, placed for unloading **on private siding** at original billed destination and reforwarded therefrom without being unloaded to a point outside of the switching limits, the through rate (Rule 2, Item 60) will be applied **plus a charge of (-) $15.11, (*) $14.38, (+) $13.07 per car, plus switching or other charges applicable** under these rules except that a diversion or reconsignment charge will not be assessed when the combination of published tariff rates applicable on a shipment terminating at and on a shipment originating at the reconsignment point is applicable to the shipment.
		Exception 4—Reconsignment charges provided by this rule will not apply on carload shipments of hay and straw that have been placed on private tracks or sidings for delivery and then diverted or reconsigned, without being unloaded, to points outside of switching limits. (Applies only on Interstate traffic and Minnesota and Wisconsin Intrastate traffic.) (In compliance with order of the Interstate Commerce Commission in Docket 14702).
		Exception 5—On shipments of Grain; Seeds (field or grass); Screenings from Grain, unground, containing not more than 5 per cent of Flaxseed; Soybeans; Hay; Straw; Corn Husks or Corn Shucks, Pummace, unground and Alfalfa Meal, carloads, placed for unloading in execution of the disposition order after inspection will be subject to the provisions of Section 2 of tariff.

For explanation of reference marks, see last page of this supplement.
For explanation of abbreviations, see last page of tariff.

SECTION 1—Concluded

Diversion or Reconsignment Rules and Charges Governing Freight Other Than as Shown in Sections 2, 3 and 4

Item	SUBJECT	RULES AND CHARGES
(R) 120-B	Rule 14 Back-Haul Rule.	(a) **Before Placement:** If a car is diverted or reconsigned before placement for unloading, the through rate (Rule 2, Item 60) will be applied from original shipping point to final destination which would apply in the absence of the out-of-line service, plus the applicable rates (or back-haul rates if any), to cover the back-haul service in each direction, **plus charge of** ⓐ**$15.11,** ⓑ**$14.58,** ⓒ**$13.67 per car,** but not in excess of the full combination of tariff rates applicable on a shipment terminating at and on a shipment originating at the point of diversion or reconsignment, without the addition of diversion or reconsignment charge. (See Exception 2 and Note 1) **(b) After Placement:** If a car has been placed for unloading at original billed destination and is forwarded therefrom without being unloaded, it will be subject to the tariff rates applicable on a shipment terminating at and on a shipment originating at the point of diversion or reconsignment. **(See Exceptions 1, 2 and 3).** **Note 1—When the total freight charges (see Note 2) from point of origin to point of diversion, reconsignment or reforwarding, are higher than the total freight charges (see Note 2) from point of origin to final destination such higher charges will apply. (This note will not apply where under relief obtained from the Fourth Section of the Interstate Commerce Act or under appropriate State Commission authority the rate tariff provides for application of through rate to final destination via diversion, reconsignment or reforwarding point.)** **Note 2—The term "Total freight charges" means line-haul charges plus back-haul or out-of-line-haul charges if any, but does not include charges for accessorial services such as diversion, reconsignment, demurrage and switching.** **Exception 1—If a car has been placed for unloading on a public delivery track but has not been unloaded or accepted by consignee or owner, it will be considered as not having been placed for unloading, and will be subject to the provisions of paragraph (a) hereof.** **Exception 2—This is not intended to prevent the application of proportional, re-shipping or trans-shipping rates on Grain; Grain Products; Screenings from grain, unground, containing not more than 5 per cent of flaxseed; Soybeans; diverted or reconsigned from carrier's tracks, but a charge of** ⓐ**$15.11,** ⓑ**$14.58,** ⓒ**$13.67 per car will be made in such cases.** **Exception 3—Anhydrous Ammonia, Petroleum and Petroleum Products; Amyl Acetate, Butyl Acetate, Ethyl Acetate, Ethyl Ether (Sulphuric), other than Anesthetic, Isopropyl, Methyl Acetate, Propyl Acetate, Acetone, Alcohol other than alcoholic liquors, viz.: Amyl Alcohol, Butyl Alcohol, Diacetone Alcohol, Propyl Alcohol, Methyl Ketone, Methyl Propyl Ketone, Methanol (methyl alcohol), in tank cars, placed for unloading on private siding at original billed destination and reforwarded therefrom without being unloaded to a point outside of the switching limits, which involves a back-haul, will be subject to the provisions of Paragraph (a) hereof.**

For explanation of reference marks, see last page of this supplement.
For explanation of abbreviations, see last page of tariff

[fol. 205]

SECTION 2

Rules and Charges Governing GRAIN; SEEDS (Field or Grass); SCREENINGS from grain, unground, containing not more than 3 per cent of flaxseed; SOYBEANS; HAY; STRAW; CORN HUSKS OR CORN SHUCKS, and PUMMIES, unground and ALFALFA MEAL, Carloads, STOPPED FOR INSPECTION AND DISPOSITION ORDERS INCIDENT THERETO at Billed Destination.

Also Rules and Charges Governing GRAIN OR SEEDS (Field or Grass), Carloads, held or stopped at Sampling Points on Instructions of Consignor or Consignee.

(Carload shipments reconsigned and not actually inspected will be subject to Rules and Charges as provided in Section 1 of this tariff.)

Traffic moving entirely within switching limits on which no road-haul service is involved is not subject to the rules provided herein.

Item	SUBJECT	RULES AND CHARGES
		Carload shipments of **Grain or Seeds** originating on Soo Line RR. or connections, and billed to Minneapolis, St. Paul or Duluth, Minn., or Superior, Wis., may be set out for carrier's convenience, free of charge, at any intermediate grain sampling station established with the approval of State authorities for the purpose of permitting the withdrawal of samples by State or Federal authorities.
		Grain or Seeds billed by the shipper to Glenwood or Thief River Falls, Minn., (sampling stations), or to St. Paul, Minneapolis, Duluth, Minn., or Superior, Wis., or beyond, with a notation on Bill of Lading to "hold for sampling and orders" at the sampling station, will be held at the designated point for the purpose indicated at a charge of "", $5.00, per car, see Exceptions 1 and 2, which charge includes switching from sampling track to and from hold track, and transportation of car regarding the car to destination on the same general direction.
		Cars which have been sampled at Thief River Falls or Glenwood, Minn., may be ordered therefrom for disposition at destination, subject to the demurrage rules applicable on cars held for inspection at such destination. Such order will not constitute a diversion order.
		Note A—Orders reading "hold for inspection" will be considered as the equivalent to "hold for sampling and order".
		Note B The charges shown above do not cover any subsequent service at final destination, with respect to which service Rules 1, 2 and 3, Items 150, 160 and 165 apply. The charge provided in Rule 1, Item 150 will not apply at intermediate sampling stations in Minnesota.
		Note C—On carload shipments of grain or seeds originating in Washington and Idaho, Glenwood, Minn., will be considered intermediate between origin and Duluth, Minn., or Superior, Wis., under this rule, on shipments received from connecting lines at Noyes, Minn., or Portal, N. D.
Rule 4		**Note D** The services authorized by this rule include transportation of samples by carriers performing the services with stored, from sampling stations to St. Paul, Minneapolis, Duluth, Minn. or Superior, Wis.
150 \ Sampling.		**Exception 1**—No charge will be made on Grain or Seeds originating at the following points

Alvo	N D	Carpio	N D	Forest River	N D	Glenwood	N D
Ardoch	N D	Carrington	N D	Fordville	N D	Parks	N D
Argusville	N D	Cleda	N D	Grano	N D	Pelto	N D
Baldwin	N D	Columbus	N D	Greene	N D	Portal	N D
Bare Spur	N D	Crosby	N D	Hurd	N D	Rural	N D
Bates	N D	Dahlen	N D	Inchmore	N D	Rubgrafe	N D
Beaulah	N D	Devils Lake	N D	Kermit	N D	Southam	N D
Berger	N D	Donnybrook	N D	Kramer	N D	Spiral	N D
Braddock	N D	Egeland	N D	Landfall	N D	Tolley	N D
Braddock	N D	Ewen	N D	Mason	N D	Whitman	N D
Burlington	N D	Fairmount	N D	Medbo	N D	Walum	N D
Cable	N D	Flaxton	N D	Norma	N D	Wimbledon	N D

or at stations on the Midland Continental R. R.

Exception 2 From stations shown in Column A the rates shown above will apply, except that in no case shall the total transportation charge, including the hold charge, exceed the charges on a like shipment of Grain or Seeds from stations shown opposite such station in Column B below without the stop charge

Column A		Column B	Column A		Column B
Arndt	N D	Bisbee, N. D.	Nekoma	N D	Alsen, N. D.
Berdahl	N D	Carrington, N. D.	Norval	N D	Whitman, N. D.
Dahlen	N D	Whitman, N. D.	Rogers	N D	Wimbledon N. D.
Eckman	N D	Hurd, N. D.	Russell	N D	Hurd, N. D.
Leal	N D	Wimbledon, N. D.	Siding No. 416	N D	Southam, N. D.
Loma	N D	Alsen, N. D.	Valley City	N D	Wimbledon, N. D.

[illegible]

[illegible] page of this supplement.
[illegible] explanation of abbreviations see last page of tariff.

SECTION 3

Rules and Charges Governing the Diversion or Reconsignment of BANANAS; BERRIES, other than cold pack; CANTALOUPES; COCOANUTS (but not including other edible nuts); CORN, FRESH OR GREEN, other than cold pack; CRANBERRIES; FRUITS, FRESH OR GREEN, other than cold pack; MELONS; PINEAPPLES; or VEGETABLES, FRESH OR GREEN, other than cold pack (including Potatoes and Onions).

Where specific rules governing the diversion, reconsignment or reforwarding of freight are provided in the tariff naming the rate under which the shipment moves, the rules named in this section will not apply.

Item	SUBJECT	RULES AND CHARGES
		If a car is stopped for orders for the purpose of delivery, inspection (See Notes 1 and 2), diversion or reconsignment or reforwarding, the stop will be considered as constituting a diversion or reconsignment under Rule 6, Item 245, and the point where the car is stopped will be considered the destination of the freight.
240	Rule 5 Stopping in Transit.	Note 1.—A car stopped enroute to allow inspection at a point between origin and billed destination shall be promptly forwarded to the next billed stop-point or destination as soon as car is released by the party making the inspection (See Note 2), unless otherwise directed in the bill of lading or in reconsigning or diversion instructions issued to carrier. Note 2.—When cars are stopped at a point between origin and billed destination for U. S. Department of Agriculture inspection, they will not be forwarded until released by the owner or his duly authorized agent.

EXPLANATION OF OTHER REFERENCE MARKS

Reference Mark		EXPLANATION
(R)	B	See Item 1
(R)	B	
(R)	A	Figures as indicated in Item 3.
*	B	Changes in wording which results in neither increases nor reductions in charges.
&	B	Reduction
•	B	Not subject to Item X-175 nor Item X-196.
(H)	B	On Illinois Intrastate traffic and on Interstate traffic at Soo Line RR stations Chicago, Ill. to Milwaukee and Waukesha, Wis., comprising Stations Nos. 5 to 220, inclusive, of C. & P. List 75, 4Rc.47 per car.
60	B	Applies only at stations in Minnesota, Montana, North Dakota and South Dakota, except Minneapolis, Minnesota Transfer, St. Paul, Duluth, West Duluth, Minn., and points east thereof.
(M)	B	Applies only on Minnesota Intrastate traffic.
□	B	□ (with number enclosed)—Removed from supplement bearing the number enclosed within the square. See Item 11.

A—Addition.
B—Brought forward without change.
For explanation of abbreviations, see last page of tariff.

[fol. 207] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

WESTERN DIVISION

[Title omitted]

ORDER GRANTING DEFENDANT LEAVE TO AMEND AND TO FILE MEMORANDUM—December 15, 1958

Defendant Union Pacific Railroad Company, having filed its motion for leave to amend its answer to the complaint herein and to amend its "motion in opposition to plaintiff's motion for summary judgment, and for summary judgment in favor of defendant", and to file a memorandum; the plaintiff having appeared by its attorney, Roy L. Stephenson, defendant appearing by its attorneys, James H. Anderson and Addison C. Kistle; and there being objection thereto by plaintiff; upon consideration of said motion and good cause appearing therefor, the defendant is hereby granted leave to amend its answer and its "motion in opposition to plaintiff's motion for summary judgment, and for summary judgment in favor of defendant", in the particulars set forth in defendant's said motion, such amendments to be filed *instanter;* and further leave is granted defendant to file the memorandum referred to in said motion on or before December 22, 1958; plaintiff is granted to January 15, 1959 to serve and file any pleading or memorandum in response thereto.

This 15th day of December, 1958.

Edwin R. Hicklin, United States District Judge.

[fol. 208] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
WESTERN DIVISION

[Title omitted]

AMENDMENT TO DEFENDANT'S "MOTION IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, AND FOR SUMMARY JUDGMENT IN FAVOR OF DEFENDANT"—Filed December 15, 1958

Defendant, pursuant to the order of the Court entered herein on the ..... day of December, 1958, granting it leave to amend, hereby amends its "motion in opposition to plaintiff's motion for summary judgment, and for summary judgment in favor of defendant", heretofore filed herein, to read as follows:

"The defendant Union Pacific Railroad Company hereby moves the court to deny the motion of the plaintiff for summary judgment, heretofore filed herein, on the ground that there are material issues of fact to be decided by the court.

"If, however, the court determines that there are no material issues of fact, then in that event the defendant moves the court to deny the motion of plaintiff for summary judgment and to enter summary judgment for the defendant, in accordance with the provisions of Rule 56 of the Rules of Civil Procedure, on the ground that the complaint of the plaintiff and the answer of the defendant on file herein, and the affidavits attached hereto marked Exhibits A-1, A-2 and A-3, [fol. 209] show that defendant is entitled to judgment as a matter of law."

And by attaching thereto and incorporating therein Exhibit "A-3" annexed hereto.

W. R. Rouse, Elmer B. Collins, James R. Anderson, 1416 Dodge Street, Omaha 2, Nebraska; Addison C. Kistle, 414 Wickham Bldg., Council Bluffs, Iowa; Attorneys for Defendant.

Acknowledgment of service (omitted in printing).

[fol. 210] Clerk's note re Exhibit A-3 (Omitted—Same as Exhibit A to "Defendant's Motion for Leave to Amend Its Answer" etc.)

[fol. 211] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

WESTERN DIVISION

[Title omitted]

AMENDMENT TO DEFENDANT'S ANSWER—Filed December 15, 1958

Defendant, pursuant to the order of the Court entered herein on the ..... day of December, 1958, granting it leave to amend, herewith amends its original answer by adding thereto a new and additional paragraph numbered "11", as follows:

"11. By order dated October 27, 1958, the Interstate Commerce Commission, in Investigation and Suspension Docket No. 7050, *Lumber—Free Time Allowance at Hold Points,* suspended tariffs filed by several railroads, not including this defendant, offering to perform without extra charge a 15-day service in the movement of lumber from the Northwest, and instituted its own investigation to determine the 'lawfulness' of the suspended tariffs 'with a view to making such findings and orders in the premise as the facts and circumstances shall warrant,' and to include in such investigation 'all matters and issues with respect to the lawfulness of the said schedules under the Interstate Commerce Act.' The 'lawfulness' of the performance of a slow or delayed service for lumber shippers involves questions within the exclusive primary administrative jurisdiction of the Commission and having asserted that jurisdiction, the Commission has superseded the jurisdiction of this Court and created a situation which renders futile and useless further proceed-

[fol. 212] ings by this Court in the instant case and calls for the dismissal of the complaint herein. Copies of the tariffs of other railroads so suspended and copy of the Commission's order dated October 27, 1958, are attached hereto as Exhibit "A" and made a part hereof."

W. R. Rouse, Elmer B. Collins, James H. Anderson, 1416 Dodge Street, Omaha 2, Nebraska; Addison C. Kistle, 414 Wickham Bldg., Council Bluffs, Iowa; Attorneys for Defendant.

Acknowledgment of service (omitted in printing).

[fol. 213] Clerk's note re Exhibit A (Omitted—Same as Exhibit A to "Defendant's Motion for Leave to Amend Its Answer" etc.)

[fol. 214] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

WESTERN DIVISION

[Title omitted]

PLAINTIFF'S MOTION TO STRIKE THE AMENDMENTS TO DEFENDANT'S "ANSWER" AND TO DEFENDANT'S "MOTION IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, AND FOR SUMMARY JUDGMENT IN FAVOR OF DEFENDANT," AND PLAINTIFF'S RENEWAL OF ITS MOTION FOR SUMMARY JUDGMENT IN FAVOR OF THE PLAINTIFF—Filed January 15, 1959

The plaintiff, United States of America, pursuant to the order of the Court entered herein on the 15th day of December, 1958, granting plaintiff leave to file any pleading or memorandum in response to defendant's amended "answer" and defendant's amended "motion in opposition to plaintiff's motion for summary judgment, and for summary judgment in favor of defendant," hereby moves the Court pursuant to Rule 12f of the Federal Rules of Civil Procedure to strike the amendment to defendant's "answer" and

to strike the amendment to defendant's "motion in opposition to plaintiff's motion for summary judgment, and for summary judgment in favor of defendant."

[fol. 215] For the grounds of this motion plaintiff says that the allegations of the amendments and exhibits attached thereto are immaterial, constitute no defense or true issue of fact herein, and precipitate no real legal issue of primary jurisdiction whereby the jurisdiction of this Court has been superseded by the Interstate Commerce Commission and the Court thereby deprived of the right and duty to act herein.

Plaintiff further renews its motion before the Court pursuant to Rule 56 of the Federal Rules of Civil Procedure to enter summary judgment in plaintiff's favor for the relief sought in the complaint, on the ground that the defendant's answer (whether amended or not) and the defendant's affidavits sworn to in support of and substantially identical to defendant's answer have admitted all the factual allegations of the complaint and that the affirmative defenses set forth by defendant are insufficient as a matter of law; accordingly, there is no genuine issue as to any material fact, and the plaintiff is entitled to judgment as a matter of law.

This portion of plaintiff's motion is based upon the exhibits already before the Court, namely:

(A) The complaint.

(B) The answer (whether or not amended).

(C) The affidavits of Messrs. David M. Laird and Harold D. McCoy.

(D) Certified public documents.

Roy L. Stephenson, United States Attorney for the Southern District of Iowa.

Dated January 15, 1959

[fol. 216] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

WESTERN DIVISION

[Title omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW—March 28, 1959

This cause has been submitted on Motions for Summary Judgment filed by each of the parties, and the Court, after having considered the Complaint, the Answer and Amendment thereto, the affidavits attached to each Motion for Summary Judgment, certified public documents, memoranda of law submitted by both parties, and after hearing arguments of counsel, finds the facts specifically which constitute the grounds of the action of the Court upon said Motions as follows:

Findings of Fact

1.

That this action is being prosecuted by the United States of America by its attorney for the Southern District of Iowa, Western Division, under the direction of the Attorney General of the United States, at the request of the Interstate Commerce Commission of the United States made by authority of the Act of Congress entitled "An Act to Further Regulate Commerce with Foreign Nations and Among the States," known as the "Elkins Act," as amended (49 U. S. C. 41-43). That the complaint charges that the [fol. 216a] defendant has violated Section 6(7) of the Act of Congress entitled "An Act to Regulate Commerce," as amended (49 U.S.C. 6(7)) and Section 1 of the "Elkins Act" (49 U.S.C. 41) by extending to transit lumber shippers and wholesalers privileges and facilities in the transportation of property which are not specified in the tariffs, and by granting and giving concessions advantages and discriminations prohibited by said Acts, and said complaint prays that said alleged violations of law be permanently enjoined.

2.

That the defendant was served with process.

3.

That defendant Union Pacific Railroad Company is and at all times in question was a corporation and a common carrier engaged in interstate and foreign commerce, for compensation, and was engaged in the transportation of property for the public between points and places in the Western states of the United States and Council Bluffs, Iowa, within the Southern District of Iowa.

4.

That for a long period of time, and particularly since September 21, 1949, up to the date of the filing of the complaint, defendant, a common carrier by railroad is and has been engaged in the interstate transportation of property, including lumber, under the tariffs and concurrences in tariffs, duly filed by defendant with the Interstate Commerce Commission, which tariffs prescribed regular charges, rules, and regulations for the interstate shipment of property.

[fol. 217] 5.

In order to produce the vast quantity of lumber required during World War II, numerous small lumber mills commenced operation in the Northwest area of the United States, mainly in northern California, Oregon and Washington. These mills did not have any established commercial market, as their production was primarily for war requirements. To remain in business when the war demand ended, it was necessary for these small mills to develop a method of merchandising adaptable to their operations, and the so-called "roller" method of lumber marketing resulted. In this type of marketing, a negotiable instrument covering the shipment is turned over to wholesalers or brokers who endeavor to locate a purchaser while the shipment is moving eastward. When a sale is consummated the transfer to the buyer is accomplished through diversion or reconsignment instructions to the railroad while the shipment is

enroute. Most of this lumber moves to markets east of the Missouri and Mississippi Rivers over lines and routes of several railroads which directly serve the Northwest area and which, with connecting lines, form numerous through routes to the various markets.

6.

That the defendant, Union Pacific Railroad, has the shortest physical route to said markets, and therefore is able to deliver the lumber under normal conditions in the shortest time.

7.

That the other railroads competing with defendant for said lumber business have longer physical routes in varying degrees, and that therefore the delivery of the lumber under [fol. 218] normal conditions takes a longer time in direct proportion to the number of miles the shipment must travel to reach its destination. For example, a shipment of lumber from Portland, Oregon, to Chicago, Illinois by Union Pacific to Council Bluffs, Iowa, and then by Chicago, Milwaukee, St. Paul and Pacific Railroad (Union Pacific direct route), would travel a distance of 2,259 miles. The same shipment, if originated by Southern Pacific Railroad would travel 2,584 miles, or 325 miles more. If the same shipment was originated by Southern Pacific Railroad and then routed through Tucumcari, New Mexico, and from there to Chicago by Chicago, Rock Island and Pacific Railroad, it would travel a distance of 3,349 miles, or 1,090 miles more than by direct Union Pacific route.

8.

That the cost of a shipment of lumber from the Northwest area of the United States to a competitive market such as Chicago, Illinois, or Council Bluffs, Iowa, is exactly the same to the shipper under published and approved tariff rates, and that this is so whether the lumber is shipped in a direct route or by a long circuitous route.

9.

That the distance from Ogden, Utah, to Council Bluffs, Iowa is 903 miles on the Union Pacific Railroad through route, and the running time of a freight train for said distance under normal conditions is from two to four days. Stated another way, a freight train will travel on the average about 300 miles per day.

10.

That following World War II, lumber shippers increasingly shipped by the longer circuitous routes in order to [fol. 219] gain additional time in which to find a market for the lumber which was in transit. That in order to meet the competition of the longer and more time-consuming routes, and in order to attract certain lumber traffic to its lines, the defendant offered to transit wholesalers of lumber a special delayed service whereby the defendant carrier intentionally delayed shipments of lumber in transit on its lines in order that the lumber wholesaler might have additional time to find a market for such lumber. As a further part of this special service, when the transit wholesaler, by means of a diversion order requested prompt delivery of the shipment because he had made a sale thereof, the defendant carrier would remove a "transit car of lumber" from the delayed service and move it forward in defendant's regular service toward destination.

11.

That beginning September 21, 1949, defendant established "SMX" schedules for the movement of freight. "SMX" is an abbreviation meaning "slow manifest service." Said "SMX" service was a delayed service wherein the delay was effected by setting loaded cars out on various sidings along the main line, where the cars could be restored to normal service whenever the shipper found a sale.

12.

That said "SMX" service applied to the movement of both perishable and dead freight, including lumber, and all

other traffic of any shipper requiring slower than normal service.

13.

That the schedule in "SMX" service between Ogden, Utah, and Council Bluffs, Iowa, was 9 days, as compared to normal time of two to four days.

[fol. 220] 14.

That because of an acute car shortage then prevailing and in an effort to assist in obtaining greater utilization of the car supply then available, defendant voluntarily suspended its "SMX" schedules effective July 31, 1950.

15.

That during the ensuing fourteen months lumber shippers increasingly routed their traffic via the longer and slower routes, and defendant on October 2, 1951, in an effort to regain such traffic, modified its procedure by handling such traffic over a parallel line of its railroad via Ellis, Kansas, which is 317 miles out of the direct line haul between Ogden, Utah, and Council Bluffs, Iowa. That under said modified procedure, the transit lumber shipper seeking delayed service had only to place the code words "route via Ellis" on the bill of lading and shipping order. That such circuitous routing required two additional days over normal schedule when interchanged to connecting carriers at Kansas City, Missouri, or three additional days over normal schedule when interchanged to connecting carriers at Council Bluffs, Iowa.

16.

That because train operations over defendant's main line are more economical than over the longer route via Ellis, Kansas, the actual physical handling of traffic via Ellis was discontinued on December 12, 1953, and a so-called "lumber special" service was inaugurated for main-line operation in which the shipment proceeded on the main line, but on a schedule comparable to that which had been obtained during the physical movement via Ellis. That a shipper desiring

such slow service continued to use the code words "route via [fol. 221] Ellis," even though the shipment did not travel by that route.

17.

That thereafter, on January 6, 1954, defendant changed its so-called "lumber special" schedule to twelve days, and again, on February 15, 1954, changed said schedule to fourteen days.

18.

That the last-mentioned method of delaying shipments continued until about June 13, 1956, at which time defendant suspended its delayed service due to the issuance of the Interstate Commerce Commission's Service Order No. 910 prohibiting the intentional delay of freight shipments while in transit.

19.

That on December 7, 1956, when the temporary Service Order No. 910 was vacated, defendant reinstated its delayed service on a fourteen-day schedule between Ogden, Utah, and Council Bluffs, Iowa, and changed the code words indicating that slow service was desired to "via Colby," and accomplished the delay by setting the lumber cars out on sidings along its direct route between the point of origin and point of destination.

20.

That defendant, by giving delayed lumber service, allows certain lumber shippers a special slow service not provided for by tariff.

21.

That by its delayed lumber service defendant carrier contributes the use of its trackage and cars to provide a storage facility for transit lumber shippers and wholesalers, thus assuming certain warehousing and inventory maintenance costs of a segment of the lumber industry at no expense to the lumber dealer.

[fol. 222] 22.

That the defendant's contribution of trackage and cars to the lumber dealers operating costs results in a loss of transportation facilities to the shipping public in the form of freight car shortages.

23.

That the defendant's unnecessary setting out of freight cars on sidings results in added carrier operational problems and costs occasioned by the additional need for power and working crews.

24.

That the defendant's delaying service entails the payment of excessive per diem cost for the use of foreign cars on defendant's line with the resulting tendency to unbalance the defendant's annual per diem offsets with other railroads to the economic disfavor of defendant and to the detriment of the national policy to maintain economically stable transportation facilities. This factor is highlighted by the per diem payments of approximately $53,760.00 incurred by the defendant on 19 lumber trains accorded its slow service during a portion of the month of July, 1954.

25.

That the defendant's delaying service for lumber as set forth above constitutes a device whereby certain transit lumber dealers avoid the payment of demurrage and obtain certain other advantages such as having their lumber on wheels ready for diversion to any potential market, such advantages place these dealers in a superior competitive position in the marketing of lumber.

[fol. 223] 26.

That the principal and compelling motive of the defendant Union Pacific throughout all phases of its activities in connection with its slow lumber practices was to secure additional lumber traffic for its line of railroad and to divert such traffic from competing railroads.

27.

That the defendant, at the time of the institution of this action, was continuing the operation of its delayed lumber service as set forth above, and is likely to continue such practices if it is not restrained.

28.

That defendant, in conjunction with other railroad common carriers, has filed and published at all times mentioned herein, and now publishes with the Interstate Commerce Commission, tariffs, of rates and charges, rules and regulations governing the line haul transportation service and accessorial services, including diversion, reconsignment, and demurrage, applicable to lumber and other commodities in carload lots transported from points in Oregon, Washington and other Western states, but does not include any extra charge for an intentionally delayed shipment.

29.

That said tariffs do not specify or provide for or offer [fol. 224] the performance of slowed or delayed transportation service, or any schedule or "running time" for performance of any transportation service, or the transportation of lumber or any other property by any particular train, or in time for any particular market; and that said tariffs do not publish or provide for any greater or lesser or additional or any different freight charges for transporting one shipment faster or slower than another shipment.

30.

That defendant has made and does make available the performance of the slower freight service for all shippers desiring such service, and has not selected nor acted secretly with any particular shippers in offering and performing such slower service. That nevertheless, the main users of such delayed service are certain lumber shippers.

31.

That after this cause was instituted, several railroads, not including the defendant herein, filed tariffs with the Interstate Commerce Commission, offering to perform without extra charge a fifteen-day delay in the movement of cars of lumber, or articles taking lumber rates, by hold- [fol. 225] ing the cars at a "hold point" without demurrage charges. That by order dated October 27, 1958, the Interstate Commerce Commission, in Investigation and Suspension Docket No. 7050, *Lumber—Free Time Allowance at Hold Points,* suspended said tariffs filed by said railroads and instituted its own investigation "into and concerning the lawfulness of the regulations contained in said schedules, with a view to making such findings and orders in the premises as the facts and circumstances shall warrant." This Court has been informed that a hearing on said matters is now in progress at Portland, Oregon.

32.

That the advantages of a delayed service schedule to certain groups are well stated in a statement contained in a letter obtained from defendant's own files and written by one of defendant's officers on May 1, 1952. It states in part as follows:

> "Eugene March was a rather cold month and quite a little snow fell in the foothills and higher elevations. This slowed production and orders were difficult to place. Even the smallest Western Wholesalers now feels that the only way to continue business is to get lined up to sell some 'rollers.' With the large mills only able to take on so much, and the small mill shipping almost entirely for the large transit wholesalers, it almost forces him to do some of this type of business.
>
> 'Rollers' moved in considerable volume during February and March. The small mill is well satisfied with this method of marketing his production. He does not have to maintain an order file of any consequence, nor does he have to carry an inventory from which to fill specified orders. He runs his logs through the mill,

loads up a car with a favorable mixture, calls the tally to his wholesale outlet and sends them his bill of lading. He can either sell the wholesaler the car outright or give it to him on a consignment basis, but in either event the wholesaler will send him up to 80% of the value of the lumber within a few days after shipment. He is always on the current market and in most cases his lumber is bringing him a premium price, either because the transit operators are bidding against each [fol. 226] other for his lumber or because the buyer is willing to pay more for lumber rolling and only a few days from being at destination, which eliminates the necessity of consumers maintaining large inventories. The rolling railroad car is the warehouse. The wholesalers, commission men and consumers in the receiving area receive many lists of rollers and from them they are nearly always able to pick up cars almost exactly covering their requirements, and only a few days away. This beats placing firm orders which at best are usually accepted on 30-days shipment, and on a rising market often just don't get shipped. About all they submit inquiries on any more are highly specified stocks which are not found in sufficient quantities in roller cars and which they must place on a firm order basis in order to fill in their low spots. These inquiries are the ones being received by the Western Wholesaler who is doing only a firm order business, and quite naturally he finds it almost impossible to get them placed."

33.

That there is no genuine issue as to any material fact in this cause.

[fol. 227] Before making specific conclusions of law, this Court is of the opinion that a discussion of the facts, the law, and the respective claims of the parties would be helpful.

Section 6(7) of the Interstate Commerce Act, 49 U.S. C.A., provides as follows:

"No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of

passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; *nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers of property, or for any service in connection therewith,* between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor *extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.*" (Emphasis supplied.)

Section 1 of the Elkins Act (49 U.S.C.A. 41) provides in pertinent part as follows:

"* * * *it shall be unlawful for any* person, persons or *corporation to offer, grant, or give,* or to solicit, accept, or receive *any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce* by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof *whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier,* as is required by said Act to regulate commerce and the Acts amendatory thereof, *or whereby any other advantage is given or discrimination is practiced.* * * *"* (Emphasis supplied.)

The Government in its complaint alleges that the delayed lumber service offered and given by the defendant without charge constitutes the extension to "roller" lumber shippers and wholesalers of privileges and facilities [fol 228] in the transportation of property which are not specified in the published tariffs, in violation of Section 6(7) of the Interstate Commerce Act above quoted.

The Government also alleges that such delayed lumber service constitutes the granting and giving of concessions and discriminations whereby lumber is transported in interstate commerce at less than published tariff rates, and whereby advantages and discriminations are practiced in favor of the transit lumber shipper or wholesaler, in violation of Section 1 of the Elkins Act above quoted.

On the other hand, the defendant contends that there are no provisions of the Interstate Commerce Act, and no rules or regulations of the Interstate Commerce Commission, requiring that railroad carriers publish in tariff form a schedule showing the length of time required for shipments of lumber. Defendant maintains that it delays lumber shipments enroute only to meet the competition of the longer, more circuitous routes of other competing carriers.

Defendant further maintains that the entire matter here under consideration is under the exclusive jurisdiction of the Interstate Commerce Commission in that it is an administrative problem to be determined by the Commission.

Section 6(1) of the Interstate Commerce Act (49 U.S. C.A. 6(1)) requires all common carriers to file with the commission and keep open for public inspection schedules showing all the "rates, fares, and charges for transportation between different points on its own route" and points on other routes when a joint rate has been established. It further provides that said schedules "shall also state separately all terminal charges, storage charges, icing [fol. 229] charges, and all other charges which the commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect or determine any part or the aggregate of such aforesaid rates, fares and charges, or the value of the service rendered to the passenger, shipper, or consignee".

In its argument, defendant states that it is clear from the basic allegations of the complaint and the suspension order of October 27, 1958, that the Commission's own investigation "covers the dominant facts alleged in the present case as constituting a violation" of the Interstate Commerce Act and the Elkins Act. Defendant goes on to state that the real basic and fundamental questions in both the

case at bar and in the Commission's investigation which is now in progress are:

(1) Whether the published tariff rates admittedly collected and retained by the defendant are "just and reasonable for both the fast and the slow service performed by the defendant, and that is a question of fact for the Commission's determination under Section 1(5) of the Interstate Commerce Act; (2) whether defendant's performance of both services at the same published rates and charges is just and reasonable "practice", and that is a question of fact for the Commission's decision under Sections 1(6) and 15(1) of said Act; (3) whether, in performing both fast service and slow service for all shippers alike at their request, for the same published tariff rates and charges, defendant may be deemed guilty of "unjust discrimination", and that is a question of fact for the Commission's decision under Section 2 of said Act; (4) whether performance of both fast and slow service for all shippers alike [fol. 230] for the same published tariff and charges causes an "undue or unreasonable preference or advantage" or any "undue or unreasonable prejudice or disadvantage", and that is a question of fact for the Commission's decision under Section 3 of said Act; and (5) whether the slow service at published rates for all shippers alike, but without description of the service in the published tariffs, in fact, constitutes "privileges" not specified in the tariffs within the prohibition of Section 6(7) of said Act, and that is a question of fact for the Commission's decision under Section 6(1) of said Act, which requires railroads to publish "all other charges which the Commission may require".

Briefly stated, defendant is attempting to invoke the doctrine of "primary jurisdiction", which provides that when Congress has created an administrative commission, board, or other agency with jurisdiction over and power to regulate some particular field of endeavor, courts cannot grant relief to any person complaining of any act done or omitted to have been done if the act or omission is of such nature as to be within the sphere of regulation of the administrative agency involved. Adler v. Chicago & Southern Air Lines, D. C. Mo., 41 F. Supp. 366.

In his excellent work on Administrative Law, Professor Davis has stated that the "fountainhead from which the entire primary judisdiction doctrine flows" is the case of Texas & Pacific R. Co. v. Abiline Cotton Oil Co. (1907) 204 U.S. 426, 27 S. Ct. 350, 51 L. Ed. 553. After discussing said case, he states:

> "Questions which the courts call "law" may appropriately be determined in the first instance by courts, because uniformity may be secured through review by a single Supreme Court, but the unifying influence of that Court can reach neither factual determination nor the exercise of specialized judgment. The line of cleavage is probably best stated by Mr. Justice Brandeis in Great Northern R. Co. v. Merchants Elevator Co. (259 U.S. 285, 291, 42 S. Ct. 477, 479, 66 [fol. 231] L. Ed. 943 (1922). "Whenever a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission . . . To determine what rate, rule or practice shall be deemed reasonable for the future is a legislative or administrative function. To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function. Preliminary resort to the Commission is required alike in the two classes of cases. It is required because the enquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts. But what construction shall be given to a railroad tariff presents ordinarily a question of law which does not differ in character from those presented when the construction of any other document is in dispute."
>
> In the Merchants case, the only question was the meaning of non-technical words in a tariff; there being no

question of fact and no question requiring expert judgment, the Court held that preliminary resort to the Commission was unnecessary. Davis, Administrative Law Treatise, Vol. 3, Sec. 19.02.

[fol. 232] It must be borne in mind that the Elkins Act is supplementary legislation to the Interstate Commerce Act. It is, in other words, part and parcel of the same specific, comprehensive, statutory scheme which Congress has enacted concerning the regulation of interstate commerce.

Specific authority has been given to the Courts to act in a situation such as that existing in the case at bar. Section 3 of the Elkins Act (43 U.S.C.A. 43) provides in pertinent part:

> "Whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discriminations forbidden by law, a petition may be presented alleging such facts to the district court of the United States sitting in equity having jurisdiction; * * * whereupon it shall be the duty of the court summarily to inquire into the circumstances, * * * and upon being satisfied of the truth of the allegations of said petition said court shall enforce an observance of the published tariffs or direct and require a discontinuance of such discrimination by proper orders, writs, and process * * * ."

In the case under consideration the Interstate Commerce Commission has administratively decided that defendant's deliberate slow lumber service is in violation of section 1 of the Elkins Act and section 6(7) of the Interstate Commerce Act and has requested the Attorney General to direct the District Attorney to institute this case. The statutory language places the duty of inquiry upon the Court, and empowers the Court to enforce its decision by proper order.

In Great Northern R. Co. v. Merchants Elevator Co., referred to in the above quotation from Professor Davis' treatise, the Supreme Court held that where the question is simply one of tariff construction the courts may pass on [fol. 233] it is an issue "solely of law". This doctrine was affirmed by the Supreme Court in the case of United States v. Western Pacific R. Co., (1956) 252 U.S. 59, 77 S. Ct. 161, 1 L. Ed. 2d 126, wherein the Court stated:

> "By no means do we imply that matters of tariff construction are never cognizable in the courts. We adhere to the distinctions laid down in *Great Northern R. Co.* v. *Merchants Elevator Co.,* supra, which call for decision based on the particular facts of each case. Certainly there would be no need to refer the matter of construction to the Commission if that body, in prior releases on opinions, has already construed the particular tariff at issue or has clarified the factors underlying it."

In the case of City of Younkers v. United States (1944) 320 U.S. 685, 64 S. Ct. 327, 88 L. Ed. 400, the Supreme Court, while deciding that the commission should make jurisdictional findings under Section 1(22) of the Interstate Commerce Act relative to abandonments of rail lines or its order thereunder should be set aside on review by the courts, nevertheless pointed out:

> "It is settled that the aid of the Commission need not be sought before the jurisdiction of a court is invoked to enjoin violations of the provisions in question. Texas & Pacific Ry. Co. v. Gulf, C. & S. Ry. Co., 270 U.S. 266."

By the same token, there is no reason why the aid of this Court cannot be invoked to enjoin violations of Section 6(7) of the Act.

Referring to the quoted language in United States v. Western Pacific R. Co., supra, it is apparent that the Interstate Commerce Commission has "already construed the particular tariff at issue or has clarified the factors underlying it."

In Chicago, Milwaukee, St. Paul & Pacific Railroad v. Spokane, Portland & Seattle Railway Company, et al., (May 1957) 300 I.C.C. 453, at 487, where the question involved was the establishment of certain routes and rates, the Commission stated:

> "We have never condemned reasonable transit or diversion privileges, such as stopping for partial unload-[fol. 234] ing and unloading, the diversion of a car from one destination to another, stopping for milling or fabrication, or storage, where the nature and sale of a commodity require such privileges, but the improper use of freight cars has been looked upon with disfavor. While it is not within our province to pass upon the respective merits of the two methods of merchandising lumber; namely, firm sales and transit sales, the deliberate routing of traffic so as to slow the movement thereof is a practice which cannot be regarded as in the public interest."

As early as 1917, the Commission stated in Reconsignment Case, 47 I.C.C. 590, at pages 623-624:

> "Retail lumber dealers, with investments in yards and stock aggregating many millions of dollars, appeared in active support of the proposed charges for reconsigning lumber. Their position is that the exaction of the same freight rates on their direct shipments as are charged the wholesale dealers for transportation between the same points, with the additional service of reconsignment, is discriminatory. They allege that under present practices the wholesale dealers are permitted to use without expense to them the railway equipment and yards for the storage of their stocks, while the retail dealers must provide their own storage facilities at great expense. The fact that shippers are able to derive an advantage over competitors through the service of the carriers is, of course, not in itself a reason for condemning a transportation practice. *It is alleged, however, that shipments are delayed through causes not arising from transportation. When a shipment reaches a hold point unsold and the market is*

rising, the dealer has an incentive to hold his shipment awaiting a further advance in price. On a falling market, on the other hand, the customer defers his purchase. In either case, it is said, the car is detained, the terminal congested, and other shippers deprived of the use of the carrier's equipment and other facilities. Delays arising from such causes are to be unqualifiedly condemned. The fact that many of the wholesale lumber dealers reconsign practically all of their shipments, while the eastern grain dealers, whose situation has been discussed, reconsign only from 20 percent to 25 percent of their shipments, indicates a radically different cause and purpose of the reconsignments in connection with the two classes of traffic. The possibility of such results of the carriers' present practices supports the belief that adequate compensation for the full period of detention awaiting orders and, if necessary, a penalty in addition, are in the public interest." (Emphasis Supplied.)

In the Export Grain Storage Charges Case (1917) 42 I.C.C. 530, the Commission considered the holding of grain cars in transit at the request of the shipper, just as lumber [fol.235] cars are held in the instant case. The Commission stated that such holding of cars was an "extra service" for which a charge should be made.

In American Paper & Pulp Association v. B. & O. R. R. Co., 41 I.C.C. 506, the Commission stated:

"In order to prevent overcharges and discriminations under the pretext of additional services, Congress enacted in section 1 that the entire body of such services, many of them, according to the theory of the common law, separable from the carrier's service as carrier, should be included within the single term "transportation" and be subject to the provisions of the act respecting reasonable rates and the like. And by section 6 no carrier may extend "any privileges or facilities," save as these have been duly specified. *But the primary duty of a carrier is to carry. And it is not the duty of a carrier, as such to furnish storage* beyond the reasonable time necessary for unloading or re-

moval. * * * *A rule which permits the shipper to use valuable facilities of the carrier for unlimited periods, while seeking to find markets for the goods stored or while awaiting the convenience of the consumer, is not a proper rule, and the practice, as complainant charges, is beyond the functions of a common carrier.*" (Emphasis added.)

In the case of Turner, Dennis & Lowry Lumber Co. v. Chicago, M. & St. P. Ry. Co., 2 F. 2d 291, 296, and 271 U. S. 259, 262, both the District Court and the Supreme Court condemned the use of freight cars for the storage of lumber while the shipper sought a market. Both courts pointed out that such storage constituted privileges and advantages to the shipper beyond the ordinary duties of a carrier.

The District Court in that case stated:

"It appears in this case that a great shortage of cars existed; that this evil was increased by the practice of a large body of lumber dealers to detain cars for an unreasonable period while they were negotiating sales to be effected through reconsignments. From the report of the Commission in this case (American Wholesale Lumber Ass'n. v. Director General, 66 Interst. Com. Com'n. R. at page 406) it appears complainants insisted that:

"Operators of the small mill, who are limited as to capital and credit, are unable to carry lumber in stock for long periods; that it is impossible for them to sell on credit; that their limited output will not warrant the heavy cost of a sales organization; that they are [fol. 236] unacquainted with traffic matters and market conditions; that they must ship their lumber as soon as it is available and must realize their return quickly; and that therefore it is vital to the continuance of their business to have the right to reconsign without any restriction of that right by the imposition of a penalty charge when cars are delayed beyond a specified limit.

"It was also urged upon the Commission:

"That the unrestricted use of the reconsignment privilege is beneficial to the small lumber retailer in that, by being able to purchase cars of lumber in transit, quickly available to meet his needs, he requires less capital and less yard space, and can maintain a better rounded as well as a smaller stock on hand," etc.

"It is evident from this that by such use of railway facilities such dealers sought to escape the natural disadvantage of small capital and inadequate facilities of their own. Of such reasons the law can take no cognizance. It does not seek to equalize natural conditions by special privileges and advantages to an individual shipper or class of shippers. The framers of the Demurrage Code refused to allow the circumstances of the particular shipper to be considered and refused to exempt shippers from demurrage charges because of conditions peculiar to them. Pennsylvania R. R. Co. v. Kittanning Co., 253 U. S. 323, 324, 40 S. Ct. 532, 64 L. Ed. 928; Texas & Pacific Ry. Co. v. Interstate Commerce Commission, 162 U. S. 197-218, 16 S. St. 666, 40 L. Ed. 940. The Carrier is not called upon to contribute its trackage and equipment for such purposes, nor is the shipping public required to suffer the resulting loss of transportation facilities."

The Supreme Court, in affirming the lower court's decision stated:

"Preliminary resort to the Interstate Commerce Commission was unnecessary, because no administrative question is presented. *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285."

and:

"One cause of undue detention is lack of promptness in loading at the point of origin or in unloading at the point of destination. Another cause is diversion of the car from its primary use as an instrument of transportation by employing it as a place of storage, either

at destination or at reconsignment points, for a long period while seeking a market for the goods stored therein. To permit a shipper so to use freight cars is obviously beyond the ordinary duties of a carrier."

[fol. 237] The defendant in the instant case maintains and argues that it must delay lumber shipments to meet the competition of the other carriers with longer lines. But is this necessarily true? Even if the longest circuitous route were taken between a point in the Northwest and Council Bluffs, Iowa, would it require 14 more days in transit than a direct shipment over defendant's lines? It does not appear to the Court that such would be the case. The longest route would be something around 1,000 miles longer than defendant's direct route, and the evidence before the Court is that the normal running time between Ogden, Utah, and Council Bluffs, Iowa, a distance of some 900 miles, is from 2 to 4 days.

Also, if the delay being practiced by defendant is only to meet competition, why have some six other competing carriers published tariffs (which have been suspended pending a hearing) in which they, too, are seeking to provide a 14-day delay for shipment of lumber without charge? It seems more reasonable to this Court that not only the defendant, but also the competing carriers wth longer lines, are trying to favor those small mills and wholesalers who do not have storage facilities of their own.

In the case of Chicago & Alton Railroad Company v. Kirby, 225 U. S. 155, the Court, after reciting the provisions of Section 1 of the Elkins Act, stated:

"The implied agreement of a common carrier is to carry safely and *deliver at destination within a reasonable time. It is otherwise when the action is for a breach of a contract to carry within a particular time,* or to make a particular connection, or to carry by a particular train. The railroad company, by its contract, became liable for the consequence of a failure to transport according to its terms. Evidence of diligence would not excuse. If the action had been for the commonlaw carrier liability, evidence that there had been no unreason-

able delay would be an answer. But the company, by [fol. 238] entering into an agreement for expediting the shipment, came under a liability different and more burdensome than would exist to a shipper who made no such special contract.

"*For such a special service* and higher responsibility *it might clearly exact a higher rate. But to do so it must make and publish a rate open to all. This was not done.*

"The shipper, it is also plain, was contracting for an advantage which was not extended to all others, both in the undertaking to carry so as to give him a particular expedited service, and a remedy for delay not due to negligence.

"*An advantage accorded by special agreement which affects the value of the services to the shipper and its cost to the carrier should be published in the tariffs,* and for a breach of such a contract, relief will be denied, because *its allowance without such publication is a violation of the act.* It is also illegal because it is an undue advantage in that it is not one open to all others in the same situation.

"The broad purpose of the Commerce Act was to compel the establishment of reasonable rates and their uniform application. That purpose would be defeated if sanction be given to a special contract by which any such advantage is given to a particular shipper as that contracted for by the defendant in error. *To guarantee* a particular connection and *transportation by a particular train, was to give an advantage or preference not open to all and not provided for in the published tariffs.* The general scope and purpose of the act is so clearly pointed out in New York, N. H. & H. Railroad Company v. Interstate Commerce Com., 200 U.S. 361, 391 and in Texas & P. Railroad Company v. Abilene Cotton Oil Co., 204 U.S. 426, as to need no reiteration.

"That the defendant in error did not see and did not know that the published rates and schedules made no provision for the service he contracted for, is no defense. For the purposes of the present question he is

> presumed to have known. The rates were published and accessible, and, however difficult to understand, *he must be taken to have contracted for an advantage not open* to others. Texas & P. Railway Co. v. Mugg, 202 U.S. 242."

While the *Kirby* case involved an agreement for expedited service, the principles laid down therein were cited in Eastern Shore of Va. P. Exch. v. New York, P. & N.R. Co., (1925) (S.C.Ap. Va.), 126 Southeastern 674, holding that under Section 1 of the Elkins Act it was unlawful for [fol. 239] a carrier to *delay* the arrival of shipments to give a shipper the advantage of a better market price. The Court said:

> "No special rate has been shown to have been published for special contracts to delay shipments, and hence no shipments could legally be delayed.
>
> "If it is unlawful to contract to expedite a shipment, it is unlawful to contract to delay it."

It might be argued no one is hurt by delaying a shipment because the ultimate consumer of the lumber cannot complain because the cost of the lumber he buys is exactly the same, insofar as the cost of transportation of the lumber is concerned, whether the lumber is shipped in the normal course of business or in a delayed shipment. This may be true, but who does ultimately pay for the delayed service? The defendant carrier admits that the transportation cost of a delayed shipment is greater than that of a normal shipment, and the evidence submitted to the Court discloses that the increased costs over a period of time amount to a very substantial sum. Someone has to pay for the increased costs, and it appears to the Court that the general public, when shipping anything or when buying anything shipped by the defendant, must ultimately pay for the increased cost of operating the defendant railroad.

It is obvious to the Court that the giving a delayed service must be of some advantage to the "roller lumber" dealer. Why else would he ask for the delayed service? The giving of an advantage is prohibited by Section 1 of the Elkins Act. The extension to any shipper of any priv-

ileges or facilities in the transportation of property, without specifying same in the published tariffs, is prohibited by Section 6(7) of the Interstate Commerce Act.

Defendant maintains that it does not have to publish its delayed service schedules in tariff form. With this conten- [fol. 240] tion this Court cannot agree. If the defendant does not have to publish that it will delay shipments for a period of 14 days, what would prevent the defendant from offering a delay of 30, 60 or 90 days?

It is the function of the Interstate Commerce Commission to determine whether or not a delay in service is reasonable under all the facts and circumstances involved. Perhaps in certain instances, a delay in service would be reasonable in order to meet the competition of competing carriers with longer physical routes. But how can the Interstate Commerce Commission ever rule upon the reasonableness of some proposed delay in service if it is never published? The Commission must have some proposed tariff presented before it can rule upon same; otherwise the question never would be properly before the Commission.

This Court wants it to be clearly understood that it is not hereby holding that the 14-day delay in service now being practiced by the defendant is unreasonable. What this Court is holding is that any intentional delay in service offered by defendant must be published in tariff form, so that the Interstate Commerce Commission can then determine if such delay is reasonable or unreasonable under the circumstances.

This Court therefore makes the following:

Conclusions of Law

1.

This Court has jurisdiction of the subject matter and of the parties.

2.

The defendant's offering, agreeing upon and giving of delayed lumber service to certain transit wholesalers and dealers in lumber for the purpose of inducing said transit [fol. 241] lumber wholesalers and dealers to ship upon de-

fendant's lines to the exclusion of competitors, and each and all of such acts constitute a device for the offer and gift of rebates, concessions, advantages, and discriminations in violation of the Elkins Act, whereby the lumber transit shippers have been offered and given and will be offered and given concessions which enabled and will enable them to transport freight in interstate commerce by common carrier by railroad at less than the published rates on file with the Interstate Commerce Commission and whereby such transit shippers of lumber have been given and will continue to be given advantages, and whereby discrimination is practiced in favor of such transit lumber shippers, all in violation of the Elkins Act.

Title 49 U.S.C., Section 41.

Chicago and Alton Railroad Company v. *Kirby,* 225 U.S. 155.

Eastern Shore of Va. P. Exchange v. *New York, P. & N. R. Co.* (1925) (S.C. Ap. Va.) 126 Southeastern 674, 676.

Louisville & Nashville Railroad Company v. *Warren County Strawberry Growers Association* (1925), 267 S.W. 551, 552.

Davis v. *Cornwell* (1924), 264 U.S. 560.

United States v. *Michigan Portland Cement Co.,* 270 U.S. 521, 522, 524.

Baltimore and Ohio R.R. Co. v. *United States,* 305 U.S. 507.

United States v. *Koenig Coal Co.,* 270 U.S. 512.

Pennsylvania R. Co. v. *International Coal Mining Co.,* 230 U.S. 184.

3.

The defendant's giving of delayed lumber service to certain transit wholesalers and dealers in lumber for the purpose of inducing said transit wholesalers and dealers to ship upon defendant's lines to the exclusion of competitors, constitutes a device by which defendant extended and [fol. 242] will continue to extend to lumber transit shippers, privileges and/or facilities in the transportation of property such as are not specified in published tariffs, such acts being in violation of Section 6(7) of the Interstate Commerce Act and Section 1 of the Elkins Act.

Title 49, U.S.C., Section 6(7), 41.

Penna. R.R. Co. v. *International Coal Mining Co.*, 230 U.S. 184, 196, 197.

Chicago & Alton Railroad Company v. *Kirby*, 225 U.S. 155.

Davis v. *Cornwell* (1924) 264 U.S. 560.

Atchison, T. & S. F. Ry. Co. v. *Springer* (1949) 172 Fed. 2d 346, 350.

Siebert v. *Erie R. Co.* (1919), 179 N.Y.S. 136, 189 App. 586, Affd. 1921, 134 N.E. 553, 232 N.Y. 517.

Louisville & Nashville R. Co. v. *Warren County Strawberry Growers Assn.*, 267 S.W. 551, 552.

Turner, Dennis & Lowry Lumber Co. v. *Chicago, Milwaukee & St. Paul Railway Co.* (1926) 271 U.S. 259, 262.

4.

The defendant's claimed defense that its granting of delayed lumber service was the result of competitive necessity, provides no legal defense to this action.

Turner, Dennis & Lowry Lumber Co. v. *Chicago, M. & St. P. Ry. Co.*, 2 F. 2d 291, 296, Affd. 271 U.S. 259.

Chicago, St. P. M. & O. Ry. Co. v. *U.S.*, 162 F. 835, cert. denied 212 U.S. 579.

Wisconsin Central Ry. Co. v. *U. S.*, 169 F. 76.

Chicago, B. & Q. R. Co. v. *U.S.*, 98 F. Supp 119, 122, Affd. 342 U.S. 845.

Allowances on Cottonseed at Columbus & Greenville Railway Points, 238 I.C.C. 309, 315, sustained in *Interstate Commerce Commission et al.* v. *Columbus & Greenville Ry. Co.*, 319 U.S. 551.

[fol. 243]

5.

The defendant's claimed defense that delayed lumber service is a matter of long established custom, provides no legal defense to this action.

A.C.L. R. Co. v. *Clinchfield Fuel Company* (D.C., S.C. 1951) 94 Fed. Supp. 992.

Eastern Shore of Va. P. Exch. v. *New York, P. & N.R. Co.* (1925) 126 S.E. 674, 676.

6.

The purpose of the Interstate Commerce Act and the Elkins Act was to outlaw every subterfuge, plan, scheme, or device formulated by or participated in by any person or corporation to give rebates, concessions, advantages, and discriminations to shippers in respect to interstate transportation by carriers subject to the Elkins Act and the statutes were designed to strike down every device without exception no matter how ingenious or labyrinthian, by which these objectives are sought to be accomplished. These statutes are intended to strike through all forms, pretenses, and subterfuges to reach and eradicate the forbidden evil.

Armour Packing Co. v. *United States,* 209 U.S. 56.
United States v. *Koenig Coal Co.,* 270 U.S. 512, 519.
Louisville & Nashville R.R. Co. v. *Mottley,* 219 U.S. 467, 478.
United States v. *Hocking Valley R.R. Co.,* 194 Fed. 234.

The present proceeding is civil in nature, and the acts complained of—whether done willfully or not—may be restrained and enjoined as to the future.

United States v. *Union Stock Yards,* 226 U.S. 286.
Union Pacific R. Co. v. *United States,* 313 U.S. 450.

[fol. 244] A permanent injunction should issue as prayed for in the complaint.

Upon the foregoing findings of fact and conclusions of law the court directs that a judgment be entered for a permanent injunction and that a form of entry be prepared by counsel for the plaintiff in accordance with the views indicated by the Court, and said form submitted to the Court.

Edwin R. Hicklin, United States District Judge.

Dated this 28th day of March, 1959.

[fol. 245] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

WESTERN DIVISION

[Title omitted]

ORDER GRANTING SUMMARY JUDGMENT—April 3, 1959

Both the plaintiff and the defendant have filed Motions for Summary Judgment pursuant to Rule 56 of the Rules of Civil Procedure, and the Court after an examination of all the proceedings, affidavits, certified public documents, briefs submitted and all proceedings had herein, and after hearing oral arguments of counsel and after being fully advised of all the facts and legal issues in this matter, finds that there is no genuine issue as to any material fact in this cause and that plaintiff should be entitled to a Summary Judgment as a matter of law. The Court has filed its Findings of Fact and Conclusions of Law herein.

It Is Therefore Ordered and Adjudged that plaintiff's Motion for Summary Judgment be, and the same is hereby granted, that an Order for an Injunction will be entered accordingly and that plaintiff shall recover its costs and charges in this behalf expended and have execution therefor if such costs and charges are not paid within thirty days.

It Is Further Ordered and Adjudged that defendant's Motion for Summary Judgment be, and the same is hereby denied.

Dated this 3rd day of April, 1959.

Edwin R. Hicklin, United States District Judge.

[fol. 246] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

WESTERN DIVISION

[Title omitted]

ORDER GRANTING INJUNCTION—April 3, 1959

This matter having come on for hearing on January 30, 1959 on plaintiff's Motion for Summary Judgment and defendant's Motion for Summary Judgment, and plaintiff appearing by Roy L. Stephenson, U.S. District Attorney, John C. Stevens, Assistant U. S. District Attorney, and Daniel M. O'Donoghue, Attorney for the Interstate Commerce Commission, and defendant appearing by E. B. Collins, Elmer B. Hobbs, James H. Anderson and Addison C. Kistle, and the Court after having considered the pleadings, affidavits, certified public documents, briefs of counsel and their oral arguments, has issued its Order Granting Summary Judgment to the plaintiff. Pursuant thereto, the Court finds that an Injunction should be issued in accordance with the prayer of the Complaint of plaintiff as hereinafter set forth.

It Is Therefore Ordered, Adjudged and Decreed that:

1. The Union Pacific Railroad Company, defendant, and its officers, agents, and servants be and they are hereby permanently enjoined and restrained from offering, granting and giving delayed lumber freight service, except as provided for in paragraph (1) of this Order, either directly or indirectly, by or through any means or device whatso-
[fol. 247] ever, and from pursuing any course of conduct having the purpose or effect of continuing or renewing violations of Section 1 of the Elkins Act (49 U.S.C. 41) or Section 6(7) of the Interstate Commerce Act (49 U.S.C. 6(7)) whereby lumber shipments are intentionally delayed at the request of a shipper or other person, thereby giving to such shipper or other person advantages, privileges, and facilities in said transportation of lumber.

2. The Union Pacific Railroad Company, defendant, and its officers, agents, and servants be and they are hereby permanently enjoined and restrained from extending to any shipper or person any privileges or facilities of delay in the transportation or delivery of shipments of lumber, unless and until such time, if at all, as there is in force with respect to the Union Pacific Railroad Company, defendant, a tariff lawfully on file with the Interstate Commerce Commission naming the rates and charges for such privileges or facilities.

Dated this 3rd day of April, 1959.

Edwin R. Hicklin, United States District Judge.

[fol. 248] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

WESTERN DIVISION

[Title omitted]

MOTION OF DEFENDANT TO MODIFY THE ORDER GRANTING INJUNCTION—Filed April 7, 1959

Comes now the Defendant, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, and requests the court to enter an order modifying the order granting an injunction heretofore filed herein under date of April 3, 1959, so as to make the effective date of such injunction April 23, 1959 for the following reasons:

1. Such order granting an injunction was entered without any prior knowledge on the part of this Defendant that the court had arrived at its decision with respect to this case or that such order or judgment was to be entered on April 3, 1959, and without this Defendant being given any opportunity whatsoever to comply therewith or to pursue such other rights or remedies as may be available to it.

2. It is this Defendant's intention to file a notice for an appeal from this court to the Supreme Court of the

United States from the order or judgment of this court granting the injunction. That such appeal to the Supreme Court of the United States is governed exclusively by the statutes of the United States and by the rules of the Supreme Court, and that under Rule 10.2 of the rules of such Supreme Court it is required that the notice of appeal shall be in three parts: (a) It shall specify the party or parties taking the appeal; shall designate the judgment or part thereof appealed from, giving its date and the time of its entry; shall specify the statute under which the appeal to this court is taken; and, if in a criminal case, shall include a general statement of the offense, the sentence imposed, and the place of confinement if the defendant below is in custody. (b) It shall include a designation of [fol. 249] the portions of the record to be certified by the clerk of the lower court to this court. (c) It shall set forth the questions presented by the appeal, expressed in the terms and circumstances of the case but without unnecessary detail.

With respect to subdivision (2) above, it is further provided in said rule that only the questions set out in the notice of appeal or fairly comprised therein will be considered by the court. It is apparent that the proper preparation of such notice of appeal and the filing thereof is basic to jurisdiction of the United States Supreme Court of any such appeal, and also apparent that a proper preparation of such notice involves a careful study of the findings of fact and conclusions of law filed herein by this court and upon which such judgment to be appealed from is based. That it will be necessary for this Defendant in order to properly perfect its appeal as aforesaid to have a reasonable period of time to prepare such notice.

3. After the service and filing of the aforementioned notice of appeal this Defendant desires an opportunity to file and serve a notice of a motion for an order of this court suspending the said injunction pending the determination of the appeal and for a hearing on such motion.

4. In any event, this Defendant requires, because of the practical problems involved, a reasonable period of time with which to comply with the injunction.

5. Under the circumstances it would be wholly inequitable for the foregoing reasons to require this Defendant to comply with the injunction without any opportunity whatsoever to prepare the prescribed notice of appeal as above set forth, or to prepare and serve a motion as aforesaid for stay pending appeal, or without granting it a reasonable time within which to comply with the court judgment [fol. 250] granting the injunction.

F. J. Melia, Elmer B. Collins, James H. Anderson, 1416 Dodge Street, Omaha 2, Nebraska; Addison C. Kistle, 414 Wickham Building, Council Bluffs, Iowa; Attorneys for Defendant.

Acknowledgment of service (omitted in printing).

[fol. 251] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

WESTERN DIVISION

[Title omitted]

MODIFICATION OF ORDER GRANTING INJUNCTION—April 7, 1959

The defendant heretofore having filed its motion requesting an order modifying the order granting injunction in this matter, with the approval of the parties said motion came on for hearing and submission before the Court at this time, the plaintiff appearing by John C. Stevens, Assistant United States District Attorney, and the defendant appearing by E. B. Collins, James H. Anderson and Addison C. Kistle. After having considered the motion and after hearing the oral arguments of counsel for both parties, the Court finds that pursuant to Rule 60 (b) the order heretofore entered granting the injunction may be modified and that the request made in said motion for modification is right and proper and should be granted.

It Is Therefore Ordered, Adjudged and Decreed that the Order Granting Injunction made and filed herein under date of April 3, 1959, be and is hereby modified to provide

that the injunction therein granted shall be effective on and after April 23, 1959.

Dated this 7th day of April, 1959.

Edwin R. Hicklin, United States District Judge.

[fol. 252] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

WESTERN DIVISION

[Title omitted]

APPLICATION OF DEFENDANT FOR ORDER SUSPENDING AND STAYING INJUNCTION PENDING APPEAL—Filed April 10, 1959

Comes now defendant Union Pacific Railroad Company and states that on April 10, 1959, it served and filed with Clerk of this Court its Notice of Appeal to the Supreme Court of the United States under Title 49 U.S.C.A. § 45, from the judgment entitled "Order Granting Summary Judgment" and the judgment entitled "Order Granting Injunction", dated and entered in this case on April 3, 1959; and pursuant to the provisions of Rule 62(c) of Federal Rules of Civil Procedure, defendant hereby applies for an order staying and suspending said judgment and injunction pending final disposition of said appeal.

In support of this application, defendant states and shows to the Court:

1. Defendant's offering and performing a slow or delayed transportation service of lumber and all other traffic for any and all shippers desiring such service is a practice of long standing and many other railroads have long been and are now engaged in performing such slow or delayed service in transportation of lumber from the west to eastern markets in competition with defendant for the lumber traffic, including the Northern Pacific Railway Company, [fol. 253] Chicago, Milwaukee, St. Paul & Pacific Railroad

Company, Chicago, Burlington & Quincy Railroad Company, Chicago, Rock Island & Pacific Railroad Company, The Chicago and North Western Railway Company, The Denver & Rio Grande Western Railroad Company, and as those other railroads are free to continue offering and performing the slow or delayed service for lumber traffic it would be inequitable and unjust to enjoin and prevent the defendant from competing for and participating in the traffic of shippers desiring such slow or delayed service pending final disposition of defendant's appeal to the Supreme Court.

2. Defendant currently derives more than $500,000 per month in gross revenues from the involved lumber traffic, practically all of which it will lose during the pendency of its appeal to the Supreme Court unless the injunction herein is stayed and suspended pending final disposition of the appeal, and such loss would be wholly irreparable as defendant would be without any remedy or recourse whatever to recover such loss.

3. Defendant would suffer further loss in that, even though it obtains a favorable decision from the Supreme Court, the shippers who now patronize its slow lumber service would in the meantime find other railroad routes and transportation channels for their lumber traffic and would be most likely to continue to patronize those routes and channels even if defendant obtains a favorable decision from the Supreme Court.

4. As defendant's slow or delayed service is offered for all traffic and to all shippers desiring such service no shipper would be injured or suffer any detriment if defendant be permitted to continue performing the slow or delayed service for shippers of lumber pending decision by the Supreme Court upon its appeal, and there is no "public interest" that would be served or benefited by prohibiting defendant from continuing to participate in [fol. 254] and to compete with other railroads for the lumber traffic of shippers desiring slow and delayed service pending disposition of defendant's appeal to the Supreme Court.

5. The proceeding before the Interstate Commerce Commission mentioned in Finding 31 will doubtless be decided in June 1959 and the decision therein concerning the lawfulness of the suspended tariffs of other railroads offering to perform delayed or slow service for lumber will most certainly announce principles and issue an order, subject to judicial review, which will serve as a uniform basis for future guidance of all railroads with respect to the performance of slow or delayed service and whether such service may or may not be performed without extra charge published in tariff form. While defendant is not a party to that proceeding, it is subject to the Interstate Commerce Act and to valid rules and regulations made by the Commission, and it is possible that the Commission's decision might make it unnecessary for defendant to further prosecute this appeal. In the circumstances, it would seem only just and fair that defendant be not subjected to the mandate of the injunction herein pending decision by the Commission on the same questions involved in the Commission proceeding and in defendant's appeal to the Supreme Court.

6. Defendant further states to the Court that since the staying and suspending of the judgment and injunction pending final disposition of the appeal by the Supreme Court would not cause any financial loss or detriment to the plaintiff United States of America, or any one else, no bond of the defendant is required or justified for the security of the rights of plaintiff in this suit, and that since Rule 10(4) of the Revised Rules of the Supreme Court of the United States abolishes bonds for costs on appeal in cases of this nature, no cost bond is required; however, [fol. 255] if the Court considers that any bond of defendant is necessary or justified, defendant will give such bond in such amount as the Court may determine and order.

Wherefore defendant prays for an order staying and suspending the judgment and injunction herein pending a final determination of defendant's appeal to the Supreme Court of the United States.

Respectfully submitted,

F. J. Melia, Elmer B. Collins, James H. Anderson, 1416 Dodge Street, Omaha 2, Nebraska, Addison C. Kistle, 414 Wickham Building, Council Bluffs, Iowa, Attorneys for Defendant.

Service of a true copy of the within and foregoing Application is hereby acknowledged the 10th day of April, 1959. The undersigned consents to hearing on said Application before the Court on April 14, 1959, at 10:00 o'clock a.m.

John C. Stevens, Attorney for Plaintiff.

[fol. 256] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

WESTERN DIVISION

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed April 10, 1959

I.

Notice is hereby given that Union Pacific Railroad Company, defendant in the above-entitled action, hereby appeals to the Supreme Court of the United States from the judgment entitled "Order Granting Summary Judgment" and the judgment entitled "Order Granting Injunction," dated and entered in this case on April 3, 1959, permanently enjoining and restraining said defendant and its officers, agents and servants under the Elkins Act, 49 U.S.C. 41-43, from performing intentionally delayed service in the transportation of lumber unless and until there is in force a tariff lawfully on file with the Interstate Commerce Commission naming the rates and charges for such service.

This appeal is taken pursuant to 49 U.S.C.A. § 45.

II.

The Clerk will please prepare a transcript of the record in this case, for transmission to the Clerk of the Supreme [fol. 257] Court of the United States, and include in said transcript the entire record before the District Court.

III.

The following questions are presented by this appeal:

(1) Whether, in view of its conclusion that "it is the function of the Interstate Commerce Commission to determine whether or not a delay in service is reasonable under all the facts and circumstances involved," and its finding of fact that after the cause herein was instituted, that Commission instituted its own investigation concerning the lawfulness of slow or delayed service in the transportation of lumber by certain railroads and to make such findings and order as the facts may warrant, the District Court erred in refusing to apply the rule of primary jurisdiction laid down by the Supreme Court in *U. S. Navigation Co.* v. *Cunard S. S. Co.*, 284 U.S. 474; *Director General of Railroads* v. *Viscose*, 254 U.S. 498; *Far East* v. *United States*, 342 U.S. 570; *Boston & Maine Co.* v. *United States*, —— U.S. ——, 79 S. Ct. 107, and other cases, and, thereupon, to dismiss or suspend action on the complaint pending the Commission's administrative findings and order.

(2) If question (1) is answered negatively, whether the District Court erred in making the administrative decision, in effect, that defendant may not lawfully perform a slow or delayed transportation service for the same published tariff rates it charges for performing "normal" or fast service.

(3) Whether, in view of its correct finding of fact that defendant's slow service applies to all traffic of all shippers alike desiring slower than normal service, and the fact that defendant collects and retains the full "published and approved tariff rates" for the slower service, the District Court erred in holding that defendant's offering and per- [fol. 258] forming the slower service constitutes "a device

for the offer and gift of rebates, concessions, advantages, and discriminations in violation of the Elkins Act" whereby lumber of shippers requiring the slower service is transported by defendant at less than the published rates on file with the Interstate Commerce Commission.

(4) Whether, since defendant concededly collects and retains for performing the slower service, the "published and approved tariff rates" lawfully on file with the Interstate Commerce Commission specifying the rates and charges for transporting lumber, the District Court erred in enjoining defendant from performing the slower service "unless and until such time, if at all, as there is in force with respect to the Union Pacific Railroad Company, defendant, a tariff lawfully on file with the Interstate Commerce Commission naming the rates and charges for such privileges or facilities."

(5) Whether, in view of the fact that there is no provision of law or any order, rule or regulation of the Commission expressly requiring defendant to publish in its tariffs the speed of its trains or time it will consume in performing transportation service, the District Court erred in holding that any intentional slow or delayed service offered by defendant must be published in tariff form.

F. J. Melia, Elmer B. Collins, James H. Anderson, 1416 Dodge Street, Omaha 2, Nebraska, Addison C. Kistle, 414 Wickham Building, Council Bluffs, Iowa, Attorneys for Defendant.

[fol. 259] Proof of Service (omitted in printing).

[fol. 260] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

WESTERN DIVISION

[Title omitted]

RESISTANCE TO APPLICATION OF DEFENDANT FOR ORDER SUSPENDING AND STAYING INJUNCTION PENDING APPEAL—Filed April 14, 1959

Comes now the United States of America, Plaintiff, by Roy L. Stephenson, United States Attorney and John C. Stevens, Assistant United States Attorney, and at the direction of the Attorney General of the United States moves the Court to deny defendant's application for order suspending and staying injunction pending appeal.

The Court having found in its Finding of Fact and Conclusions of Law, filed April 3, 1959, that the defendant, Union Pacific Railroad Company violated the Elkins Act by giving delayed lumber service and allowing certain lumber shippers special slow service not provided for by tariff; that defendant's application requests that it be permitted to continue this violation pending its appeal to the Supreme Court of the United States; that this Court by granting defendant's application and issuing a stay order would in effect be authorizing defendant to continue its violation of the Elkins Act.

Wherefore, United States of America prays that the defendant's application be denied and that the injunction become effective from and after the 23rd day of April, 1959.

United States of America, Roy L. Stephenson, United States Attorney, John C. Stevens, United States Attorney.

[fol. 261] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

WESTERN DIVISION

Civil Action No. 1-299

UNITED STATES OF AMERICA, Plaintiff,

v.

UNION PACIFIC RAILROAD COMPANY, Defendant.

ORDER STAYING INJUNCTION—April 14, 1959

Now, on this 14th day of April, 1959, this matter came on to be heard upon the application of the defendant, Union Pacific Railroad Company, for an order suspending and staying the injunction heretofore entered herein on April 3, 1959, and heretofore stayed by order of this court until April 23, 1959, pending the final determination of its appeal to the Supreme Court of the United States from the judgment granting such injunction, and upon the resistance of the plaintiff thereto. The defendant appeared by its Attorneys, Elmer B. Collins and James H. Anderson, the plaintiff by its Attorney, John C. Stevens. The matter was argued to the court, and the court being fully advised in the premises finds that said application of the defendant should be granted so as to suspend the injunction herein for a period of six months from April 23, 1959, or until the final disposition of said case on appeal, whichever is sooner; the court further finds that in the event it appears that it will not be possible within such period of time to have a final determination of this case by the Supreme Court of the United States the court will consider an application for a further order suspending such injunction pending determination of the appeal.

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed, That pending the final determination of the appeal herein to the Supreme Court of the United States,

the injunction heretofore entered herein under date of April 3, 1959 be and the same is hereby stayed and suspended in all respects for a period of six months from and after April 23, 1959, or until the final disposition of [fol. 262] said appeal to the Supreme Court of the United States, whichever is sooner. No supersedeas bond is required.

The Court Further Decrees, That in the event it appears there will be no final determination of this case upon appeal to the Supreme Court of the United States within the aforesaid six months' period that it will consider an application for a further stay or suspension of such injunction pending the final determination of the case on appeal.

Edwin R. Hicklin, United States District Judge.

[fol. 263]

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

WESTERN DIVISION

Civil No. 1-299

[Title omitted]

DOCKET ENTRIES

1957.

Dec. 23 Filed Complaint.

Dec. 23 Issued Summons and delivered to U. S. Marshal with copy of Complaint.

Dec. 24 Filed Summons with Marshal's Return: Served 12/23/57 on W. W. McKee, Gen. Traffic Agt., 407 Equitable Bldg., Des Moines, Iowa. Pitt —$3.00.

1958.

Jan. 10 Filed Appearance of Attorneys for Defendant.

Jan. 10 Filed Defendant's Answer to Complaint.

Apr. 7 Filed Clerk's Court Minutes.

Apr. 7 Filed Stipulation requesting continuance.

Apr. 7 Filed Order of Continuance. Hicklin, J. (0J2-735) Notice to Attys. 4/7/58.

Sept. 17 Filed Motion for Summary Judgment.

Sept. 17 Filed Notice of Motion for Summary Judgment to be heard October 6, 1958, 10:00 A.M.

Oct. 1 Filed Motion in Opposition to Plaintiff's Motion for Summary Judgment, and for Summary Judgment in Favor of Defendant. (F.R.C.P. 56)

Oct. 6 Filed Clerk's Court Minutes.

Oct. 7 Filed Order. Hicklin, J. to file briefs—arrange for oral submission. (0J3-42) Copies to Attys. 10/7/58.

Oct. 24 Filed Memorandum in Support of Plaintiff's Motion for Summary Judgment.

[fol. 264]

1958.

Nov. 17 Filed Defendant's Brief in Support of its Motion to Deny Plaintiff's Motion for Summary Judgment and for Summary Judgment in favor of Defendant.

Nov. 17 Filed Certificate of Service of Brief.

Dec. 1 Filed Plaintiff's Memorandum in Opposition to the Brief in Support of Defendant's Motion to Deny Plaintiff's Motion for Summary Judgment and for Summary Judgment in favor of Defendant. (Delivered to Court.)

Dec. 15 Filed Defendant's Motion for Leave to Amend its Answer to the Complaint herein and to Amend its "Motion in Opposition to Plaintiff's Motion for Summary Judgment in favor of Defendant" and to file a Memorandum in connection with the Amendments.

Dec. 15 Filed Amendment to Defendant's Answer.

Dec. 15 Filed Amendment to Defendant's "Motion in Opposition to Plaintiff's Motion for Summary Judgment, and for Summary Judgment in Favor of Defendant".

Dec. 16 Filed Order Granting Defendant Leave to Amend and to File Memorandum. Hicklin, J. (0J3-105)

Dec. 22 Filed Defendant's Memorandum on Questions Raised by Amendments to Its Answer and Motion for Summary Judgment.

1959.

Jan. 12 Filed Application for Authority to Withdraw Exhibits and Order.

Jan. 12 Filed Order. Hicklin, J. (0J3-126) (To be returned by 1/16/59)

Jan. 15 Filed Plaintiff's Motion to Strike the Amendments to Defendant's "Answer" and to Defendant's "Motion in Opposition to Plaintiff's Motion for Summary Judgment, and for Summary Judgment in Favor of Defendant", and Plaintiff's Renewal of Its Motion for Summary Judgment in Favor of the Plaintiff.

Jan. 15 Filed Plaintiff's Memorandum in Support of its Motion to Strike the Amendments to Defendant's Answer and Motion for Summary Judgment.

Jan. 26 Filed Defendant's Motion for Continuance of Hearing on January 30, 1959, with Affidavit attached.

Jan. 27 Filed Defendant's Motion for Leave to Withdraw Motion and Affidavit for Continuance of Hearing.

Jan. 27 Filed Order Granting Leave to Withdraw Motion for Continuance. Hicklin, J. (0J3-143) Notice to Counsel 1/27/59.

Jan. 30 Filed Clerk's Court Minutes.

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1959.

Apr. 3 Filed Findings of Fact and Conclusions of Law. (3 copies delivered to U. S. Atty., Des Moines, Iowa; copies mailed to Addison C. Kistle, Council Bluffs, Iowa, and to Walter R. Rouse and James H. Anderson, Omaha, Nebraska)

Apr. 3 Filed Order Granting Summary Judgment. Hicklin, J. (0J3-176). (Summary judgment granted Plaintiff with costs and charges, and Order for Injunction—Summary Judgment denied Defendant) Notice to Attys. 4/3/59.

Apr. 3 Entered Summary Judgment in favor of Plaintiff, United States of America, and against defendant, Union Pacific Railroad Company, with costs and Injunction Order. Hicklin, J. (0J3-176) Notice to Attys. 4/3/59.

Apr. 3 Filed Order Granting Injunction. Hicklin, J. (0J3-177,178). (Permanent Injunction) Notice to Attys. 4/3/59.

Apr. 7 Filed Motion for Order Modifying Injunction Order.

Apr. 7 Filed Modification of Order Granting Injunction. Hicklin, J. (0J3-182, 183) (Effective date to be 4/23/59) Notice to Attys. 4/7/59.

Apr. 10 Filed Notice of Appeal to the Supreme Court of the United States with proof of service. (copies of said Notice of Appeal were mailed by Elmer B. Collins, Counsel for Appellant, to Hon. J. Lee Rankin, Sol. Gen. of U. S., Washington, D. C.; to Roy L. Stephenson, U. S. Attorney and John C. Stevens, Asst. U. S. Attorney, Des Moines, Iowa, and to Daniel M. O'Donoghue, Atty. Bureau of Inquiry and Compliance, ICC, Washington, D. C. on this 10th day of April, 1959.)

Apr. 10 Filed Application of Defendant for Order Suspending and Staying Injunction pending Appeal.

Apr. 14 Filed Resistance to Application of Defendant for Order Suspending and Staying Injunction pending Appeal.

Apr. 14 Filed Clerk's Court Minutes. Entered Hearing on motion; motion granted, counsel for Defendant to prepare Order. Hicklin, J. (0J3-215)

Apr. 16 Filed Order. Hicklin, J. (0J3-226, 227) (Injunction stayed and suspended for 6 months from April 23, 1959, or until disposition of said appeal, whichever is sooner. No supersedeas bond required, if not determined within six months period further application will be considered.) Notice to Attys. 4/16/59.

[fol. 266] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 267]

SUPREME COURT OF THE UNITED STATES

No. 98, October Term, 1959

UNION PACIFIC RAILROAD COMPANY, Appellant,

v.

UNITED STATES

Appeal from the United States District Court for the Southern District of Iowa.

ORDER NOTING PROBABLE JURISDICTION—October 12, 1959

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary calendar.

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JAMES R. BROWNING

No. [redacted] 98

In the Supreme Court of the United States

October Term, 1958

UNION PACIFIC RAILROAD COMPANY,
Appellant,

v.

UNITED STATES OF AMERICA.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA

JURISDICTIONAL STATEMENT

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Law Briefs—OMAHA LINO-SLUG PRINTING CO., 418 So. 15th St.

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Appendix B—Opinion of the United States District Court for Southern District of Iowa (including Findings of Fact, Conclusions of Law, Order Granting Summary Judgment and Order Granting Injunction).

In the Supreme Court of the United States

October Term, 1958

No.————

UNION PACIFIC RAILROAD COMPANY,
Appellant,

v.

UNITED STATES OF AMERICA.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the United States District Court for the Southern District of Iowa has not been officially reported. A copy (including Findings of Fact, Conclusions of Law, Order Granting Summary Judgment and Order Granting Injunction) is attached as Appendix B hereto.

JURISDICTION

This suit was brought by the United States of America under the act commonly known as the Elkins Act, 49 U. S. C. 41-43, to enjoin appellant from allegedly violating Section 6(7) of the Interstate Commerce Act (49 U. S. C. 6(7)) and Section 1 of the Elkins Act by performing, in order to compete with longer, circuitous routes, a slow or

delayed service for all shippers requiring such service, in transporting lumber at the same published tariff rates appellant and the circuitous routes charge for "normal" service in transporting lumber, without the time consumed in performing either the normal service or the slow service, or any *extra* charge for the slow service being specified in published tariffs. The summary judgment and injunction of the district court were entered on April 3, 1959, and notice of appeal was filed in that court by appellant on April 10, 1959. The district court has stayed and suspended the injunction until October 23, 1959. Jurisdiction of this Court to review this case on direct appeal is conferred by 49 U.S.C. § 45. The following decisions sustain the jurisdiction of this Court to review the judgment on direct appeal in this case: *U. S. v. Elgin, J. & E. Ry.*, 298 U. S. 492; *Union Pacific R. Co. v. U. S.*, 313 U. S. 450; *United States v. South Buffalo R. Co.*, 333 U. S. 771.

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act (49 U.S.C.), Sections 1(3)(a), (4), (10), (14), (15) and 6(1) and (7), and of the Elkins Act (49 U.S.C.), Sections 41(1) and 43, involved in this appeal, are set forth in Appendix A hereto.

QUESTIONS PRESENTED

1. Whether, in view of its conclusion that "it is the function of the Interstate Commerce Commission to determine whether or not a delay in service is reasonable under all the facts and circumstances involved," and its finding of fact that after the complaint herein was filed, the Commission instituted and now has under consideration its own investigation concerning the lawfulness of slow or delayed service in the transportation of lumber by several other railroads (not including appellant) and will

make such findings and order as the facts may warrant, the district court erred in refusing to apply the settled rule of primary administrative jurisdiction applied by this Court in *U. S. Nav. Co. v. Cunard S. S. Co.*, 284 U. S. 474; *Director General v. Viscose Co.*, 254 U. S. 498; *Far East Conf. v. United States*, 342 U. S. 570; *Boston & Maine Railroad Co. v. United States*, —— U. S. ——, 79 S. Ct. 107, and other cases, and, thereupon, to dismiss the complaint.

2. If question 1 is answered negatively, whether the district court erred in making the administrative decision, in effect, that appellant may not lawfully perform a slow or delayed transportation service for the same published tariff rates it charges for performing "normal" or fast service.

3. Whether, in view of its correct finding of fact that appellant's slow service is performed for *all* traffic of *all* shippers alike desiring slower than normal service, and the fact that appellant collects for the slower service, and retains the full "published and approved tariff rates," the district court erred in holding that appellant's offering and performing the slower service constitutes "a device for the offer and gift of rebates, concessions, advantages, and discriminations in violation of the Elkins Act" whereby lumber of shippers requiring the slower service is transported by appellant "at less than the published rates on file with the Interstate Commerce Commission."

4. Whether, since appellant concededly collects and retains for performing the slower service, the "published and approved tariff rates" lawfully on file with the Interstate Commerce Commission specifying the rates and charges for transporting lumber, the district court erred in enjoining defendant from performing the slower

service "unless and until such time, if at all, as there is in force with respect to the Union Pacific Railroad Company, defendant, a tariff lawfully on file with the Interstate Commerce Commission naming the rates and charges for such privileges or facilities."

5. Whether, in view of the fact that there is no provision of law or any order, rule or regulation of the Commission expressly requiring appellant to publish in its tariffs the speed or schedules of its trains or time it will consume in performing transportation service, the district court erred in holding that any intentional slow or delayed service offered by appellant must be published in tariff form, and that competitive necessity provides no legal defense to this action.

STATEMENT

For many years, under certain commercial marketing conditions and distribution methods, shippers of various commodities have required, and railroads have provided, flexibility and variation in train schedules and transit time for movement of commodities from place of production to final markets or places of consumption. It is an established practice of long standing in the shipping, distributing and marketing of commodities under certain market conditions for shippers to consign shipments to themselves to some intermediate point, deliver the shipments to railroads and start them on their way from point of production before they have found buyers for the commodities, and to search for buyers while the commodities are moving in the direction of and nearer to markets where the shippers know from experience that they will ultimately find buyers. (Such traffic is designated "transit" traffic in the complaint herein but it is more commonly called and will be referred to herein as "roller" traffic.) When a buyer is found, the shipper

gives a "reconsignment" or "diversion" order to the railroad having possession of the shipment, reconsigning or re-billing the shipment on the through rate to the newly found destination and buyer.

Reconsignment or diversion of traffic while in transit is an established commercial practice of long standing and is fully authorized by railroad tariffs duly filed and published with the Interstate Commerce Commission. The reconsignment or diversion privilege at the through rate is the "key" to this method or practice of transporting, distributing and marketing commodities. The practice has been long and well known to the Commission and has received its blessings. *Detroit Traffic Asso. v. L. S. & M. S. Ry. Co.*, 21 I. C. C. 257, at page 259.

Shippers of such "roller" traffic generally require a longer time for movement of such traffic than is normally required or desired if the buyer and ultimate destination of the shipment are known before the traffic moves from point of production or origin. To obtain such longer time in transit for such traffic shippers have for many years followed the established practice of routing such shipments over longer or circuitous routes over which, as in the instant case, their shipments move at the same tariff rates and charges at which they move over shorter routes. This practice of shippers in routing their "roller" traffic over longer circuitous routes to obtain more time in transit to enable them to find buyers has also received the Commission's blessing. *Quality Gas & Oil Co. v. Northern Pac. Ry. Co.*, 185 I. C. C. 395.

To compete with the longer circuitous routes used by shippers for such "roller" traffic, railroads, such as appellant, having the shorter direct routes must render a transportation service which is slower than they normally accord traffic not requiring such longer transit time.

Establishment and maintenance at the same tariff rates, fares and charges, by appellant and other railroads of fast, slow or different speeds of freight train schedules and services, adjusted for competition with competing lines and routes of railroad, and to the marketing and distribution needs of patrons, is a practice that has always prevailed in competitive railroad transportation operations in the United States.

Union Pacific, having a shorter, if not the shortest, transcontinental railroad route, has provided, from time to time during at least the past 20 years, for such "roller" traffic requiring such longer time in transit a service designated as "SMX," an abbreviation meaning "slow manifest service."

While the complaint in this case has singled out "roller" lumber traffic, the fact, as stated in the district court's Finding 12, is that appellant's slow service has always "applied to the movement of both perishable and dead freight, including lumber, and all other traffic of any shippers requiring slower than normal service," although "roller" lumber traffic from the Northwest to the East, to which the complaint is limited, constitutes the bulk of the traffic presently using such service. Appellant derives more than $500,000 per month of gross revenues from the lumber traffic involved in this case.

In order to produce the vast quantity of lumber required during World War II, numerous small lumber mills commenced operation in the Northwest area of the United States, mainly in northern California, Oregon and Washington. These mills did not have any established commercial market, as their production was primarily for war requirements. To remain in business when the war demand ended, it was necessary for these small mills to develop a method of merchandising adaptable

to their operations, and the so-called "roller" or "transit" method of lumber marketing resulted. In this type of marketing, a negotiable instrument covering the shipment is turned over to wholesalers or brokers who endeavor to locate a purchaser while the shipment is moving eastward. When a sale is consummated the transfer to the buyer is accomplished through "diversion" or "reconsignment" instructions to the railroad while the shipment is en route.

Most of this lumber moves to markets in the United States east of the Missouri and Mississippi Rivers over the lines and routes of several railroads which directly serve the Northwest area and which, with connecting lines, form numerous through routes with equal joint rates applicable thereto. The routes so formed vary in length and some of them are much longer than others. For example, the direct route via Union Pacific from Portland, Oregon, to Chicago, Illinois, is 2,259 miles, while routes via other railroads between those points are as much as 1,564 miles longer than the Union Pacific route. From Medford, Oregon, to Joliet, Illinois, the route via Union Pacific is 2,445 miles, while other routes are as much as 1,745 miles longer. From Smith Flat, California, to Chicago, Illinois, the Union Pacific route is 2,232 miles, while other routes are as much as 1,850 miles longer.

As in the case of other "roller" traffic, shippers route "roller" lumber traffic over the longer or more circuitous routes requiring more time in transit, to enable them to find buyers while the shipments are moving eastward; and, in such circumstances, the lumber traffic is lost by the shorter routes, including this appellant's route, because of the longer time in transit utilized by the longer routes.

It is an ironical fact that by granting rate relief from Section 4 of the Interstate Commerce Act for lumber traffic the Commission itself established the long circuitous routes to compete at the same rates with the shorter direct routes, including the route of this appellant, which it now seeks to prevent from competing with those long circuitous routes for the "roller" lumber traffic, *Commodity Rates on Lumber and Other Forest Products,* 165 I.C.C. 561.

Section 1(3) and (a) of Interstate Commerce Act defines the term "railroad" and also defines the term "transportation" as including locomotives, cars and "all instrumentalities and facilities of shipment or carriage," and Section 1(4) makes it the duty of every common carrier subject thereto "to provide and furnish transportation upon reasonable request therefor, * * *."

A railroad's compensation for providing the tracks, cars, locomotives and other facilities used in moving a shipper's goods from place to place and for the actual movement of them is obtained through complying with Section 6(1) of the Act which requires railroads to file and publish tariffs showing "all the rates, fares and charges for transportation" between points on its own route and between points on its route and points on the routes of other railroads.

In other words, the "rates, fares, and charges," which railroads are required to publish in tariffs and collect from shippers, are for *transporting* the shippers' goods, by means and through the use of the railroads' tracks, cars, locomotives and other facilities, from place to place, and performance of kindred service in connection with such movement.

The Act does not require railroads to publish in tariffs separate or additional rates or charges for the

use of its *tracks, locomotives, cars* or other facilities used in performing the "transportation" which railroads are required to furnish.

Nor does the Act require railroads to publish tariffs showing the schedules or "running time" of their trains, or to "hold out," promise or obligate themselves, through tariff publication or otherwise, to move goods or passengers between places within any particular or specified time, or to move all of their trains at the same speed or within the same "running time" or upon the same schedule; or to publish tariffs naming a special, additional or different charge for running one train, or moving one shipment faster or slower than another.

THE COMMISSION'S PRIMARY ADMINISTRATIVE JURISDICTION

It is noted that, in addition to terminal, storage and icing charges expressly named and required to be published in tariffs, Section 6(1) requires railroads to publish "all other charges which the Commission may require." This clearly makes it the primary administrative duty and jurisdiction of the Commission—and not the judicial function of the courts—to determine what "other" charges, if any, should be separately stated and published in tariffs, and to issue its order, rule or regulation accordingly.

But the Commission has never exerted that primary administrative jurisdiction to order or require railroads to specify in their tariffs separate, special or additional rates or charges for the use of their tracks, locomotives, cars or other facilities used in transporting shippers' goods; or to publish in tariffs the schedules or "running time" of their trains; or to run one train or move one shipment of goods no slower or faster than

another, or to publish a separate, additional or special charge for slower or faster movement of passengers or goods; or to prevent Union Pacific or any other railroad from readjusting the "running time" or schedule of its trains in efforts to compete with other railroads, or to meet the requirements of commercial marketing and distributing methods for slow, fast or "normal" movement of goods.

Neither the Union Pacific nor any other railroad files or publishes, or has ever filed or published tariffs naming any such rates or charges, or setting forth or containing any such information as that described in the last preceding paragraph hereof, nor has the Commission required or suggested such publication.

Notwithstanding the foregoing facts and circumstances--particularly the fact that appellant files with the Commission, collects and retains for its slow lumber service the rates specified in published tariffs for transporting lumber and any and all other traffic of any shippers, and the further fact that there is no provision of law or any order, rule or regulation of the Commission expressly prohibiting railroads from performing either a normal or a slower than normal service for the same tariff rate, nor expressly requiring railroads to specify in their tariffs the speed or time to be consumed in performing either normal or slower than normal transportation service, or to publish and collect an extra charge for a slower than normal service—the complaint herein, filed December 23, 1957, alleges that appellant's performance of slow service in transporting lumber "without charge and not pursuant to specific tariff provision" constitutes the giving of concessions and discriminations in respect to the transportation of property whereby appellant transports lumber at less rates than those stated in its

published tariffs in violation of the Elkins Act, and the granting of privileges and facilities not specified in the tariffs in violation of Section 6(7) of the Interstate Commerce Act.

As stated in the district court's Finding 31, after the complaint was filed, several other railroads which, like appellant, had been and now are offering and performing slower than normal service in transporting lumber, filed tariffs with the Commission offering to perform without extra charge in addition to published tariff rates a slow service in transporting lumber the same as appellant's slow lumber service. Such tariffs were filed by the following railroads:

Minneapolis, St. Paul & Sault Ste. Marie Railroad Company

Chicago, Burlington & Quincy Railroad Company

Chicago, Milwaukee, St. Paul & Pacific Railroad Company

Chicago and North Western Railway Company

Chicago, Rock Island and Pacific Railroad Company

Illinois Central Railroad Company

By order dated October 27, 1958, the Commission suspended all of said tariffs until June 1, 1959, Investigation and Suspension Docket No. 7050, *Lumber—Free Time Allowance at Hold Points,* and instituted its own investigation to determine the "lawfulness" of the suspended tariffs "with a view to making such findings and orders in the premises as the facts and circumstances shall warrant" and to include in such investigation "all matters

and issues with respect to the lawfulness of the said schedules under the Interstate Commerce Act."

The Commission has conducted public hearings at Portland, Oregon, and New Orleans, Louisiana, in its investigation, and is due to issue its decision, findings and order by June 1, 1959.

By leave of court appellant amended its answer to the complaint herein and its motion for summary judgment, submitting copies of said tariffs and setting forth the facts showing that the Commission had instituted its own investigation to make its administrative determination concerning the "lawfulness" of the same slow service in transporting lumber which the complaint prayed the court to find unlawful and to enjoin appellant from performing. Appellant, thereupon, prayed for dismissal of the complaint on the ground that the basic and fundamental questions raised by the complaint were within the Commission's primary administrative jurisdiction and were basically the same as the questions to be determined by the Commission in its investigation of the same subject.

Although it correctly held that "it is the function of the Interstate Commerce Commission to determine whether or not a delay in service is reasonable under all the facts and circumstances involved," the district court refused to dismiss the complaint, and held that appellant's slow lumber service is a device to give "rebates, concessions, advantages and discriminations in violation of the Elkins Act," whereby the lumber shippers obtain transportation at less than the published tariff rates, and whereby privileges and facilities not specified in published tariffs are granted to lumber shippers in violation of Section 6(7) of the Interstate Commerce Act.

The court entered an "Order Granting Summary Judgment" for the United States of America, and an "Order Granting Injunction" which permanently enjoins appellant from—

> "* * * extending to any shipper or person any privileges or facilities of delay in the transportation or delivery of shipments of lumber, unless and until such time, if at all, as there is in force with respect to the Union Pacific Railroad Company, defendant, a tariff lawfully on file with the Interstate Commerce Commission naming the rates and charges for such privileges or facilities."

However, upon appellant's application for a stay pending this appeal, the district court has stayed and suspended the injunction until October 23, 1959.

THE QUESTIONS ARE SUBSTANTIAL

1. The district court held:

> "It is the function of the Interstate Commerce Commission to determine whether or not a delay in service is reasonable under all the facts and circumstances involved. Perhaps in certain instances, a delay in service would be reasonable in order to meet the competition of competing carriers with longer physical routes. * * * "

The court further, in its Finding 31, recites the fact that after the complaint was filed in this case several railroads (not including appellant) filed tariffs with the Commission offering to perform without extra charge a 15-day slow or delayed service in transporting lumber and that the Commission, in Investigation and Suspension Docket No. 7050, *Lumber—Free Time Allowance at Hold Points,* suspended those tariffs and instituted its own investigation "into and concerning the lawfulness of the regula-

tions contained in said schedules with a view to making such findings and orders in the premises as the facts and circumstances shall warrant."

Thus, the initial question in this case is whether the district court erred in refusing to apply the rule of primary jurisdiction reiterated and applied by this Court in *U. S. Nav. Co. v. Cunard S. S. Co.*, 284 U. S. 474; *Director General v. Viscose Co.*, 254 U. S. 498; *Far East Conf. v. United States*, 342 U. S. 570; *Boston & Maine Railroad Co. v. United States*, —— U. S. ——, 79 S. Ct. 107, and other cases, and thereupon, to dismiss the complaint.

Notwithstanding its recognition of the Commission's primary administrative jurisdiction to determine whether appellant's slow service is reasonable, and the fact that the Commission now has that very question under consideration for decision, the district court seemed of opinion that the rule of primary administrative jurisdiction had no application because the Elkins Act expressly empowered the court to issue an injunction upon its own finding that appellant's slow service in transporting lumber constitutes "a device for the offer and gift of rebates, concessions, advantages and discriminations." This, we submit, clearly reflects the court's misunderstanding of the primary administrative jurisdiction rule. As stated more than 50 years ago by this Court, it is not the duty or function of courts to decide disputed question that are "peculiarly within the province of the Commission," and when such questions arise it is the duty of the courts "to remand the case to the Commission to enable it to perform that duty." *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 444.

The district court stated that the Interstate Commerce Commission has already administratively decided that appellant's slow lumber service is in violation of

Section 1 of the Elkins Act and Section 6(7) of the Interstate Commerce Act and has requested the Attorney General to direct the District Attorney to institute this case. The complaint does not allege that the Commission has so decided or that it requested the Attorney General to institute the suit, but even if it did, this would not constitute a performance by the Commission of its administrative function to hold hearings and make a determination upon all of the facts whether appellant's slow service violates any provision of the Act. The Commission has made no such determination with respect to appellant's slow lumber service. It did issue its Service Order No. 910, because of an acute freight car shortage, effective June 13, 1956, to December 8, 1956. The order prohibited all railroads from delaying the movement of loaded freight cars during the car shortage, but made no determination whether appellant's slow lumber service violated any law. See *Railroad Operating Regulations for the Movement of Loaded Freight Cars,* 298 I. C. C. 371.

The complaint and the decision below apparently proceed upon the theory that appellant's offering and performing both a slow and a normal service for all shippers alike for the same published tariff rates without describing or specifying the slow service in published tariffs and without making an extra charge for it renders the slow service, *ipso facto,* a violation of Section 6(7) of the Act and Section 1 of the Elkins Act.

The ultimate allegation in the complaint that appellant's slow service is unlawful is a mere conclusion of the lawyers who wrote the complaint drawn from their basic allegations that appellant's slow service is a device whereby "advantages" are given and "discriminations are practiced"; that the slow service without tariff publication is an unlawful extension of "privileges and fa-

cilities"; that the slow service contributes "trackage and cars to provide a storage facility" and results in "freight car shortages," in "additional need for power and working crews," in "excessive per diem cost" to appellant to the "economic disfavor of appellant" and "detriment of the national policy to maintain economically stable transportation facilities," and to give "advantages" to certain shippers, placing them in "a superior competitive position in the marketing of lumber." Appellant's answer denies those allegations; and whether they are true or false depends upon findings of fact derived from evidence setting forth detailed and probative facts in particularity.

It is clear from the basic allegations of the complaint and the broad scope of the suspension order dated October 27, 1958, that the Commission's own investigation embraces and "covers the dominant facts alleged in the present case as constituting a violation" of the Interstate Commerce Act and the Elkins Act, *United States Nav. Co. v. Cunard S. S. Co.*, 284 U. S. 474, 483.

For example the real basic and fundamental questions in both the case at bar and in the Commission's investigation are: whether the published tariff rates admittedly collected and retained by appellant are "just and reasonable" for both the fast and the slow service performed by appellant, and that is a question of fact for the Commission's determination under Section 1(5) of the Act; whether appellant's performance of both services at the same published tariff rates and charges is just and reasonable "practice," and that is a question of fact for the Commission's decision under Sections 1(6) and 15(1) of the Act; whether, in performing both fast service and slow service for all shippers alike at their re-

quest, for the same published tariff rates and charges, appellant may be deemed guilty of "unjust discrimination," and that is a question of fact for the Commission's decision under Section 2 of the Act; whether performance of both fast and slow services for all shippers alike for the same published tariff rates and charges causes an "undue and unreasonable preference or advantage" or any "undue or unreasonable prejudice or disadvantage," and that is a question of fact for the Commission's decision under Section 3 of the Act; and whether the slow service at published tariff rates for all shippers alike, but without discription of the service in the published tariffs, in fact, constitutes "privileges" not specified in the tariffs within the prohibition of Section 6(7) of the Act, and that is a question of fact for the Commission's decision under Section 6(1) of the Act, which requires railroads to publish "all other charges which the Commission may require."

That such questions are administrative and not judicial in character is clearly shown by the fact that 36 years ago the Commission, in *Transportation of Strawberries by Express,* 81 I. C. C. 634 (1923), conducted an investigation as to whether freight train schedules and service for movement of strawberries from the South to Northern markets were adequate and whether faster service should be ordered. It found, page 644, that "present service is inadequate so far as the time of transportation is concerned" and that "the present schedule should be materially shortened." In a further report, rendered in 1929, involving the same problem, 151 I. C. C. 553, the Commission found that "present freight service for the transportation of strawberries * * * is inadequate" and that the railroads should establish express refrigeration service for movement of berries from the South to Northern markets. In a still further report in that proceed-

ing, 156 I. C. C. 4, the Commission ordered schedules that would provide "third morning" delivery to certain named Northern markets and "fourth morning" delivery to other Northern markets.

In none of the Commission's three reports is there any suggestion that the faster or expedited service should be published in tariffs.

That such problems are administrative and not judicial in nature is further indicated by provisions of the Interstate Commerce Act, Section 1(10), which defines "car service" as including:

> "* * * the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this chapter."

Section 1(14) (a) authorizes the Commission, after hearing upon complaint or its own initiative, to "establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad * * *."

Section 1(15) empowers the Commission upon finding that there is a shortage of equipment, congestion of traffic or other emergency requiring immediate action, to issue orders remedying the situations which cause the emergency. As pointed out above, the Commission exercised that power in dealing with the very subject matter involved in this suit, upon finding that "an accute shortage of freight cars exists" and by issuing its Service Order No. 910, which prohibited railroads from delaying the movement of loaded freight cars "for the purpose of increasing the time in transit." The Order was vacated by

the Commission December 8, 1956, apparently because the shortage of freight cars no longer existed, thus removing any justification for prohibiting delayed movement of loaded cars for the purpose of increasing the time in transit.

Section 6(1) of the Act provides that railroads shall file tariffs publishing "rates, fares and charges for transportation" as therein specified, "and all other charges which the Commission may require." While appellant does not concede that the last quoted words authorize the Commission to require railroads to publish in their tariffs "delayed service" or any other type of service performed in moving traffic at tariff rates, or any special or extra charges for box cars or trackage used in different types or speeds of service, appellant submits that those words demonstrate beyond doubt that the courts are not to be burdened with such matters, and that, if there is authority anywhere to require tariff publication of operating schedules, or extra charges for slow, fast or different types of services, box cars, trackage and other facilities used in performing the service, such authority is left to the administrative discretion of the Commission. But the Commission, during the 72 years of its existence, has never undertaken to determine, prescribe or require that railroads must file and publish tariffs specifying train operating schedules, time of movement of traffic, slow or fast service, or separate and additional charges for different speeds or types of service, use of box cars, trackage or other facilities.

The situation here is practically identical to that in the *Cunard* case *supra* (284 U. S. 474), in which the complaint, brought to enjoin alleged violations of the antitrust laws, was dismissed on the ground that the matters complained of were within the exclusive administrative

jurisdiction of the United States Shipping Board, under the Shipping Act of 1916. In that case a group of steamship lines by agreement among them charged a low rate to shippers who agreed to ship all of their traffic via the lines of the group but charged the regular and twice higher tariff rate to shippers who would not agree to ship all their traffic via the lines of the group. This and other concerted activities of the group were alleged to be in violation of the anti-trust laws. Significantly, the carriers in that case charged two types of rates (low contract and high tariff) for the same service, while in the case at bar appellant charges one and the same rate for two types (slow and fast) service. This Court conceded that the complaint in that case stated a cause of action and furnished ground for an injunction under the anti-trust laws "unless the Shipping Act stands in the way" (page 480), but held at page 485 that:

> "A comparison of the enumeration of wrongs charged in the bill with the provisions of the sections of the Shipping Act above outlined conclusively shows, without going into detail, that the allegations either constitute direct and basic charges of violations of these provisions, or are so interrelated with such charges as to be, in effect, a component part of them; *and the remedy is that afforded by the Shipping Act, which to that extent supersedes the anti-trust laws.* Compare Keogh v. C. & N. W. Ry. Co., supra, 260 U. S. at page 162, 43 S. Ct. 47, 49, 67 L. Ed. 183. The matter therefore is within the exclusive preliminary jurisdiction of the shipping Board. The scope and evident purpose of the Shipping Act, as in the case of the Interstate Commerce Act, is demonstrative of this conclusion. * * *" (Italics Added.)

In *United States v. Trucking Co.*, 310 U. S. 344, at pages 352-353, this Court held:

> "'It is not disputable that from the beginning the very purpose for which the Commission was cre-

ated was to bring into existence a body which from its peculiar character would be most fitted to primarily decide whether from facts, disputed or undisputed, in a given case preference or discrimination existed.' [Citing, *United States v. Louis. & Nash. R.* R., 235 U. S. 314, 320.]

"* * * The Interstate Commerce Act does not attempt to define an unlawful discrimination with mathematical precision. Instead, different treatment for similar transportation services is made an unlawful discrimination when 'undue,' 'unjust,' 'unfair,' and 'unreasonable.' *And the courts have always recognized that Congress intended to commit to the Commission the determination, by application of an informed judgment to existing facts, of the existence of forbidden preferences, advantages and discrimination.*" (Italics added.)

As neither the Interstate Commerce Act nor the Elkins Act expressly prohibits or condemns as unlawful the performance of either a slow service or a fast service for the same rate or charge, and since appellant admittedly collects and retains the full published tariff rate for both types of service, its slow service may *not,* like a "rebate" [which both Acts expressly prohibit], be condemned as "a thing *ipso facto* illegal and prohibited by the statute," *Mitchell Coal Co. v. Penna. R. R. Co.,* 230 U. S. 247, 261; and, since the "legal quality" of the slow service has not—like a rebate or refund to a shipper of a part of the tariff rate—been "definitely fixed by the statute," so, performance of the slow service, "otherwise permissible is lawful or unlawful, according as it is reasonable or unreasonable," or, in fact, brings about a "discrimination," "advantage" or some other result which the Commission determines to be prohibited by the Act.

Having exercised its exclusive administrative jurisdiction under Section 15(7) of the Act to suspend and

refuse to permit the tariff provisions of other railroads, *infra,* page 11, offering slow or delayed service from becoming effective, the Commission *must* now, under the corollary command of Section 15(7), proceed to conduct a "hearing" concerning the "lawfulness" of the slow or delayed service proposed by the suspended tariffs; and, "after full hearing," the Commission must make such "decision" and "order" as the facts and circumstances shall warrant. If its decision is that the slow service is "unlawful," its order will direct that the suspended tariff provisions be cancelled and the proceedings discontinued. If its decision is that the slow service is "lawful," its order will vacate the suspension order of October 27, 1958, and discontinue the proceedings, thus permitting the tariffs to become effective, and the carriers to perform the slow service. In the latter event, appellant herein will need only to publish its slow service in tariff form, which it would do immediately. Or, the Commission may come forth with some "middle-ground" ruling or regulation.

Since the Commission's final decision of the questions raised by its suspension of tariffs publishing slow or delayed service will be the result of consideration, by the only tribunal having exclusive administrative jurisdiction of railroads subject to the Interstate Commerce Act, of "all matters and issues with respect to the lawfulness of the said schedules [the practice of railroads performing slow or delayed service without extra charge] under the Interstate Commerce Act," whatever order, rule or regulation the Commission issues or lays down should serve as a guide and apply uniformly to all railroads subject to the Act on the question whether they may lawfully, with or without tariff publication and an extra charge, perform two types of service, namely, a slow or delayed service and a fast or "normal" service for the same published tariff rates.

All of the cases cited above, *infra,* page 3, reiterate and apply the rule of primary administrative jurisdiction discussed at length in the *Cunard* case. In the *Boston & Maine* and *Far East* cases the court proceedings were ended by dismissal because the further administrative proceedings would result in orders by the Commission and the Board, respectively, which orders would be subject to special judicial review, thus rendering further proceedings by the Court in the cases before it futile and useless. Likewise, in the case at bar, the Commission's investigation which it has ordered concerning the "lawfulness" of the tariffs it has suspended will result in a decision and orler, rule or regulation by the Commission which will also be subject to special judicial review.

In *Director General of Railroads v. Viscose Co.,* 254 U. S. 498, this Court said at page 504:

> "The importance to the commerce of the country of the exclusive, initial jurisdiction which Congress has committed to the Interstate Commerce Commission need not be repeated and cannot be overstated * * *." [citing numerous cases.]

2. The district court's decision is ambiguous and confusing . Disregarding its correct findings of fact that appellant offers and performs both a normal and a slower than normal transportation service for *all traffic* and *all shippers* alike at the same published tariff rates which it collects and retains in full for either service; that appellant has not selected or acted secretly with any particular shippers in offering and performing slower than normal service and that appellant offers and performs the slower service in order to compete with the longer routes that consume more time in transporting "roller" traffic, the district court erroneously concluded that the slower service for lumber shippers, *ipso facto,* constitutes a device for giving "rebates, concessions, advantages and discrim-

inations in violation of the Elkins Act" whereby lumber shippers obtain transportation "at less than the published rates on file" with the Commission, and "privileges and/or facilities" not specified in published tariffs, in violation of the Elkins Act and Section 6(7) of the Interstate Commerce Act.

Notwithstanding these positive holdings that the slower service violates specific statutory provisions, the court says it "wants it to be clearly understood that it is not hereby holding that the 14-day delay in service now being practiced by the defendant is unreasonable"; that it is the function of the Commission "to determine whether or not a delay in service is reasonable under all the facts and circumstances involved"; that "[p]erhaps in certain instances, a delay in service would be reasonable in order to meet the competition of competing carriers with longer physical routes"; and that "[w]hat this Court is holding is that any intentional delay in service offered by defendant must be published in tariff form," so that the Commission can "determine if such delay is reasonable or unreasonable under the circumstances."

Thus, although refusing to follow the rule of exclusive primary administrative jurisdiction laid down by this Court, and, thereupon, to dismiss the complaint and remand the problem to the Commission, and though holding that the slow lumber service violates specific statutory provisions, the court disclaims it is holding that the slow service is "unreasonable" [which clearly means "unlawful"], holds that it is the Commission's function to determine whether the slow service is unreasonable, but insists that appellant must file a tariff publishing the slow service so that the Commission can determine whether the service is reasonable or unreasonable.

The court then permanently enjoins appellant from performing the slow service for lumber shippers "unless and until" there is "in force" with respect to appellant, a tariff lawfully on file with the Commission naming the rates and charges for such service, despite the fact that appellant already has "in force" and on file with the Commission a tariff naming the rates and charges for transporting lumber, but not specifying the slow service (or the transit time of any service) or any extra charge for it, and despite the fact, recognized by the court, that the Commission now has under suspension for determination of their lawfulness, the tariffs of six other railroads publishing offers to perform the same slow service those railroads and appellant are now performing, but which the district court enjoins appellant from performing.

Only this Court can dissipate the ambiguity and confusion in the district court's decision.

3. There is no statutory provision, nor has the Commission during the 72 years of its existence issued any order, rule or regulation expressly requiring that railroads publish and file in tariff form the operating schedule of their trains or the time within which they propose to move traffic over their lines, or which prevents railroads from operating some of their trains and moving some shipments slower or faster than others, or which requires railroads to operate all of its trains or move all shipments at equal speeds or running time, or which requires railroads to make separate, special, additional or different charges for moving some shipments faster or slower than others or for use of box cars in which shipments are stored and protected while in course of movement, or for the use of trackage and other facilities used in performing the transportation service for which they collect the published tariff line-haul freight rates. It is essential not only to appellant but to all railroads and

shippers that this Court decide whether publication of such information and charges in tariff form, as ordered by the district court, is required by law.

4. It is important to appellant and other railroads having shorter routes that this Court decide whether they are prevented from augmenting their services, including the transit time of shipments over their lines, in order to compete for "roller" traffic with longer circuitous railroad routes unless, as held by the district court, they must defeat their efforts to compete for such traffic by publishing higher or extra rates and charges for performing competitive slow or delayed service.

5. The substantiality and the importance of the questions presented is indicated by the fact that appellant, as pointed out above, realizes more than $500,000 per month—more than $6,000,000 annually—from the lumber traffic involved in this case, practically all of which it would lose if, as required by the district court, it must publish an extra charge for its slow service, thus making the total freight charges for equivalent transit time higher over its routes than over the routes of the longer, circuitous lines.

CONCLUSION

We submit that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

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PROOF OF SERVICE

I, ELMER B. COLLINS, counsel of record for appellant, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 8th day of June, 1959, I served copies of the foregoing Jurisdictional Statement on the adverse party, as follows:

1. On the United States of America by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Honorable J. Lee Rankin
Solicitor General of the United States
Department of Justice
Washington 25, D. C.

and with first-class postage prepaid to:

Roy L. Stephenson, Esq.
United States Attorney
202 U. S. Court House
Des Moines, Iowa

John C. Stevens, Esq.
Asst. United States Attorney
202 U. S. Court House
Des Moines, Iowa.

2. On the Interstate Commerce Commission by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Daniel M. O'Donoghue, Esq.
Attorney
Bureau of Inquiry and Compliance
Interstate Commerce Commission
Washington 25, D. C.

ELMER B. COLLINS,
Counsel of Record
for Appellant.

APPENDIX A

The pertinent provisions of the Interstate Commerce Act, 49 U. S. C., involved in this appeal are as follows:

Section 1 (3)(a)—

> "* * * The term 'railroad' as used in this chapter shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term 'transportation' as used in this chapter shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. * * *"

Section 1 (4)—

> "It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; * * *".

Section 1 (10)—

> "The term 'car service' in this chapter shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the

supply of trains, by any carrier by railroad subject to this chapter."

Section 1 (14)—

"(a) The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this chapter, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for nonobservance of such rules, regulations, or practices.

"(b) It shall be unlawful for any common carrier by railroad or express company, subject to this chapter, to make or enter into any contract, agreement, or arrangement with any person for the furnishing to or on behalf of such carrier or express company of protective service against heat or cold to property transported or to be transported in interstate or foreign commerce, or for any such carrier or express company to continue after April 1, 1941, as a party to any such contract, agreement, or arrangement unless and until such contract, agreement, or arrangement has been submitted to and approved by the Commission as just, reasonable, and consistent with the public interest: *Provided,* That if the Commission is unable to make its determination with respect to any such contract, agreement, or arrangement prior to said date, it may extend it to not later than October 1, 1941."

Section 1 (15)—

"Whenever the commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have, and

it is given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, wthout answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the commission may determine: (a) to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the commission; (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between the carriers as they may agree upon, or, in the event of their disagreement, as the commission may after subsequent hearing find to be just and reasonable; (c) to require such joint or common use of terminals, including main-line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency as between the carriers as they may agree upon, or, in the event of their disagreement, as the commission may after subsequent hearing find to be just and reasonable; and (d) to give directions for preference or priority in transportation, embargoes, or movement of traffic under permits, at such time and for such periods as it may determine, and to modify, change, suspend, or annul them. In time of war or threatened war the President may certify to the commission that it is essential to the national defense and security that certain traffic shall have preference or priority in transportation, and the commission shall, under the power herein conferred, direct that such preference or priority be afforded."

Section 6 (1)—

"Every common carrier subject to the provisions

of this chapter shall file with the commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respecttively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this chapter."

Section 6 (7)—

"No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares and charges upon

which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

The pertinent provisions of the Elkins Act, 49 U. S. C., involved in this appeal are as follows:

Section 41(1)—

"Anything done or omitted to be done by a corporation common carrier, subject to chapter 1 of this title, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said chapter or under sections 41, 42, or 43 of this title, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in chapter 1 of this title or by sections 41, 42, or 43 of this title, with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to chapter 1 of this title to file and publish the tariffs or rates and charges as required by said chapter, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than $1,000 nor more than $20,000

for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said chapter whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said chapter, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concessions, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than $1,000 nor more than $20,000; * * *."

Section 43—

"That whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discriminations forbidden by law, a petition may be presented alleging such facts to the circuit court of the United States sitting in equity having jurisdiction; and when the act complained of is alleged to have been committed or as being committed in part in more than one judicial district or State, it may be dealt with, inquired of, tried, and determined in either such judicial district or State, whereupon it shall be the duty of the court summarily to inquire into the circumstances, upon such notice and in such manner as the court shall direct and without the formal pleadings and proceedings applicable to ordinary suits in equity, and to make such other persons or corporations parties thereto as the court may deem necessary, and upon being satisfied of the truth of

the allegations of said petition said court shall enforce an observance of the published tariffs or direct and require a discontinuance of such discrimination by proper orders, writs, and process, which said orders, writs, and process may be enforceable as well against the parties interested in the traffic as against the carrier, subject to the right of appeal as now provided by law. It shall be the duty of the several district attorneys of the United States, whenever the Attorney-General shall direct, either of his own motion or upon the request of the Interstate Commerce Commission, to institute and prosecute such proceedings, and the proceedings provided for by this Act shall not preclude the bringing of suit for the recovery of damages by any party injured, or any other action provided by said Act approved February fourth, eighteen hundred and eighty-seven, entitled An Act to regulate commerce and the Acts amendatory thereof. And in proceedings under this Act and the Acts to regulate commerce the said courts shall have the power to compel the attendance of witnesses, both upon the part of the carrier and the shipper, who shall be required to answer on all subjects relating directly or indirectly to the matter in controversy, and to compel the production of all books and papers, both of the carrier and shipper, which relate directly or indirectly to such transaction; the claim that such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such person from testifying or such corporation producing its books and papers, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence documentary or otherwise in such proceeding: * * *."

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
WESTERN DIVISION

CIVIL ACTION NO. 1-299

UNITED STATES OF AMERICA,
Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause has been submitted on Motions for Summary Judgment filed by each of the parties, and the Court, after having considered the Complaint, the Answer and Amendment thereto, the affidavits attached to each Motion for Summary Judgment, certified public documents, memoranda of law submitted by both parties, and after hearing arguments of counsel, finds the facts specifically which constitute the grounds of the action of the Court upon said Motions as follows:

FINDINGS OF FACT

1.

That this action is being prosecuted by the United States of America by its attorney for the Southern District of Iowa, Western Division, under the direction of the Attorney General of the United States, at the request of the Interstate Commerce Commission of the United States made by authority of the Act of Congress entitled "An Act to Further Regulate Commerce with Foreign Nations and Among the States", known as the "Elkins Act," as amended (49 U. S. C. 41-43). That the complaint charges that the defendant has violated Section

6(7) of the Act of Congress entitled "An Act to Regulate Commerce," as amended (49 U. S. C. 6(7)) and Section 1 of the "Elkins Act" (49 U. S. C. 41) by extending to transit lumber shippers and wholesalers privileges and facilities in the transportation of property which are not specified in the tariffs, and by granting and giving concessions, advantages and discriminations prohibited by said Acts, and said complaint prays that said alleged violations of law be permanently enjoined.

2.

That the defendant was served with process.

3.

That defendant Union Pacific Railroad Company is and at all times in question was a corporation and a common carrier engaged in interstate and foreign commerce, for compensation, and was engaged in the transportation of property for the public between points and places in the Western states of the United States and Council Bluffs, Iowa, within the Southern District of Iowa.

4.

That for a long period of time, and particularly since September 21, 1949, up to the date of the filing of the complaint, defendant, a common carrier by railroad is and has been engaged in the interstate transportation of property, including lumber, under the tariffs and concurrences in tariffs, duly filed by defendant with the Interstate Commerce Commission, which tariffs prescribed regular charges, rules, and regulations for the interstate shipment of property.

5.

In order to produce the vast quantity of lumber required during World War II, numerous small lumber mills

commenced operation in the Northwest area of the United States, mainly in northern California, Oregon and Washington. These mills did not have any established commercial market, as their production was primarily for war requirements. To remain in business when the war demand ended, it was necessary for these small mills to develop a method of merchandising adaptable to their operations and the so-called "roller" method of lumber marketing resulted. In this type of marketing, a negotiable instrument covering the shipment is turned over to wholesalers or brokers who endeavor to locate a purchaser while the shipment is moving eastward. When a sale is consummated the transfer to the buyer is accomplished through diversion or reconsignment instructions to the railroad while the shipment is enroute. Most of this lumber moves to markets east of the Missouri and Mississippi Rivers over lines and routes of several railroads which directly serve the Northwest area and which, with connecting lines, form numerous through routes to the various markets.

6.

That the defendant, Union Pacific Railroad, has the shortest physical route to said markets, and therefore is able to deliver the lumber under normal conditions in the shortest time.

7.

That the other railroads competing with defendant for said lumber business have longer physical routes in varying degrees, and that therefore the delivery of the lumber under normal conditions takes a longer time in direct proportion to the number of miles the shipment must travel to reach its destination. For example, a shipment of lumber from Portland, Oregon, to Chicago, Illinois by Union Pacific to Council Bluffs, Iowa, and then by Chicago, Milwaukee, St. Paul and Pacific Railroad (Union Pacific direct route), would travel a distance of

2,259 miles. The same shipment, if originated by Southern Pacific Railroad would travel 2,584 miles, or 325 miles more. If the same shipment was originated by Southern Pacific Railroad and then routed through Tucumcari, New Mexico, and from there to Chicago by Chicago, Rock Island and Pacific Railroad, it would travel a distance of 3,349 miles, or 1,090 miles more than by direct Union Pacific route.

8.

That the cost of a shipment of lumber from the Northwest area of the United States to a competitive market such as Chicago, Illinois, or Council Bluffs, Iowa, is exactly the same to the shipper under published and approved tariff rates, and that this is so whether the lumber is shipped in a direct route or by a long circuitous route.

9.

That the distance from Ogden, Utah, to Council Bluffs, Iowa, is 903 miles on the Union Pacific Railroad through route, and the running time of a freight train for said distance under normal conditions is from two to four days. Stated another way, a freight train will travel on the average about 300 miles per day.

10.

That following World War II, lumber shippers increasingly shipped by the longer circuitous routes in order to gain additional time in which to find a market for the lumber which was in transit. That in order to meet the competition of the longer and more time-consuming routes, and in order to attract certain lumber traffic to its lines, the defendant offered to transit wholesalers of lumber a special delayed service whereby the defendant carrier intentionally delayed shipments of lumber in transit on its lines in order that the lumber wholesaler might have additional time to find a market for such lumber. As a

further part of this special service, when the transit wholesaler, by means of a diversion order requested prompt delivery of the shipment because he had made a sale thereof the defendant carrier would remove a "transit car of lumber" from the delayed service and move it forward in defendant's regular service toward distination.

11.

That beginning September 21, 1949, defendant established "SMX" schedules for the movement of freight. "SMX" is an abbreviation meaning "slow manifest service." Said "SMX" service was a delayed service wherein the delay was affected by setting loaded cars out at various sidings along the main line, where the cars could be restored to normal service whenever the shipper found a sale.

12.

That said "SMX" service applied to the movement of both perishable and dead freight including lumber, and all other traffic of any shipper requiring slower than normal service.

13.

That the schedule in "SMX" service between Ogden, Utah, and Council Bluffs, Iowa was 9 days, as compared to normal time of two to four days.

14.

That because of an acute car shortage then prevailing and in an effort to assist in obtaining greater utilization of the car supply then available, defendant volun tarily suspended its "SMX" schedules effective July 31 1950.

15.

That during the ensuing fourteen months lumber shippers increasingly routed their traffic via the longer

and slower routes, and defendant on October 2, 1951, in an effort to regain such traffic, modified its procedure by handling such traffic over a parallel line of its railroad via Ellis, Kansas, which is 317 miles out of the direct line haul between Ogden, Utah, and Council Bluffs, Iowa. That under said modified procedure, the transit lumber shipper seeking delayed service had only to place the code words "route via Ellis" on the bill of lading and shipping order. That such circuitous routing required two additional days over normal schedule when interchanged to connecting carriers at Kansas City, Missouri or three additional days over normal schedules when interchanged to connecting carriers at Council Bluffs, Iowa.

16.

That because train operations over defendant's main line are more economical than over the longer route via Ellis, Kansas, the actual physical handling of traffic via Ellis was discontinued on December 12, 1953, and a so-called "lumber special" service was inaugurated for main-line operation in which the shipment proceeded on the main line, but on a schedule comparable to that which had been obtained during the physical movement via Ellis. That a shipper desiring such slow service continued to use the code words "route via Ellis", even though the shipment did not travel by that route.

17.

That thereafter, on January 6, 1954, defendant changed its so-called "lumber special" schedule to twelve days, and again on February 15, 1954, changed said schedule to fourteen days.

18.

That the last-mentioned method of delaying shipments continued until about June 13, 1956, at which time

defendant suspended its delayed service due to the issuance of the Interstate Commerce Commission's Service Order No. 910 prohibiting the intentional delay of freight shipments while in transit.

19.

That on December 7, 1956, when the temporary Service Order No. 910 was vacated, defendant reinstated its delayed service on a fourteen-day schedule between Ogden, Utah, and Council Bluffs, Iowa, and changed the code words indicating that slow service was desired to "via Colby," and accomplished the delay by setting the lumber cars out on sidings along its direct route between the point of origin and point of destination.

20.

That defendant, by giving delayed service, allows certain lumber shippers a special slow service not provided for by tariff.

21.

That by its delayed lumber service defendant carrier contributes the use of its trackage and cars to provide a storage facility for transit lumber shippers and wholesalers, thus assuming certain warehousing and inventory maintenance costs of a segment of the lumber industry at no expense to the lumber dealer.

22.

That the defendant's contribution of trackage and cars to the lumber dealers operating costs results in a loss of transportation facilities to the shipping public in the form of freight car shortages.

23.

That the defendant's unnecessary setting out of freight cars on sidings results in added carrier operational problems and costs occasioned by the additional need for power and working crews.

24.

That the defendant's delaying service entails the payment of excessive per diem cost for the use of foreign cars on defendant's line with the resulting tendency to unbalance the defendant's annual per diem offsets with other railroads to the economic disfavor of defendant and to the detriment of the national policy to maintain economically stable transportation facilities. This factor is highlighted by the per diem payments of approximately $53,760.00 incurred by the defendant on 19 lumber trains accorded its slow service during a portion of the month of July, 1954.

25.

That the defendant's delaying service for lumber as set forth above constitutes a device whereby certain transit lumber dealers avoid the payment of demurrage and obtain certain other advantages such as having their lumber on wheels ready for diversion to any potential market, such advantages place these dealers in a superior competitive position in the marketing of lumber.

26.

That the principal and compelling motive of the defendant Union Pacific throughout all phases of its activities in connection with its slow lumber practices was to secure additional lumber traffic for its line of railroad and to divert such traffic from competing railroads.

27.

That the defendant, at the time of the institution of this action, was continuing the operation of its delayed lumber service as set forth above, and is likely to continue such practices if it is not restrained.

28.

That defendant, in conjunction with other railroad common carriers, has filed and published at all times mentioned herein, and now publishes with the Interstate Commerce Commission, tariffs, of rates and charges, rules and regulations governing the line haul transportation service and accessorial services, including diversion, reconsignment, and demurrage, applicable to lumber and other commodities in carload lots transported from points in Oregon, Washington and other Western states, but does not include any extra charge for an intentionally delayed shipment.

29.

That said tariffs do not specify or provide for or offer the performance of slowed or delayed transportation service, or any schedule or "running time" for performance of any transportation service, or the transportation of lumber or any other property by any particular train, or in time for any particular market; and that said tariffs do not publish or provide for any greater or lesser or additional or any different freight charges for transporting one shipment faster or slower than another shipment.

30.

That defendant has made and does make available the performance of the slower freight service for all shippers desiring such service, and has not selected nor acted secretly with any particular shippers in offering and performing such slower service. That nevertheless,

the main users of such delayed service are certain lumber shippers.

31.

That after this cause was instituted, several railroads, not including the defendant herein, filed tariffs with the Interstate Commerce Commission, offering to perform without extra charge a fifteen-day delay in the movement of cars of lumber, or articles taking lumber rates, by holding the cars at a "hold point" without demurrage charges. That by order dated October 27, 1958, the Interstate Commerce Commission, in Investigation and Suspension Docket No. 7050, *Lumber—Free Time Allowance at Hold Points,* suspended said tariffs filed by said railroads and instituted its own investigation "into and concerning the lawfulness of the regulations contained in said schedules, with a view to making such findings and orders in the premises as the facts and circumstances shall warrant." This Court has been informed that a hearing on said matters is now in progress at Portland, Oregon.

32.

That the advantages of a delayed service schedule to certain groups are well stated in a statement contained in a letter obtained from defendant's own files and written by one of defendant's officers on May 1, 1952. It states in part as follows:

> "*EUGENE* March was a rather cold month and quite a little snow fell in the foothills and higher elevations. This slowed production and orders were difficult to place. Even the smallest Western Wholesalers now feels that the only way to continue business is to get lined up to sell some "rollers". With the large mills only able to take on so much, and the small mill shipping almost entirely for the large transit wholesalers, it almost forces him to do some of this type of business.

" 'Rollers' moved in considerable volume during February and March. The small mill is well satisfied with this method of marketing his production. He does not have to maintain an order file of any consequence, nor does he have to carry an inventory from which to fill specified orders. He runs his logs through the mill, loads up a car with a favorable mixture, calls the tally to his wholesale outlet and sends them his bill of lading. He can either sell the wholesaler the car outright or give it to him on a consignment basis, but in either event the wholesaler will send him up to 80% of the value of the lumber within a few days after shipment. He is always on the current market and in most cases his lumber is bringing him a premium price, either because the transit operators are bidding against each other for his lumber or because the buyer is willing to pay more for lumber rolling and only a few days from being at destination, which eliminates the necessity of consumers maintaining large inventories. The rolling railroad car is the warehouse. The wholesalers, commission men and consumers in the receiving area receive many lists of rollers and from them they are nearly always able to pick up cars almost exactly covering their requirements, and only a few days away. This beats placing firm orders which at best are usually accepted on 30-days shipment, and on a rising market often just don't get shipped. About all they submit inquiries on any more are highly specified stocks which are not found in sufficient quantities in roller cars and which they must place on a firm order basis in order to fill in their low spots. These inquiries are the ones being received by the Western Wholesaler who is doing only a firm order business, and quite naturally he finds it almost impossible to get them placed."

33.

That there is no genuine issue as to any material fact in this cause.

Before making specific conclusions of law, this Court is of the opinion that a discussion of the facts, the law, and the respective claims of the parties would be helpful.

Section 6(7) of the Interstate Commerce Act, 49 U.S.C.A., provides as follows:

> "No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; *nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith,* between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor *extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.*" (Emphasis supplied)

Section 1 of the Elkins Act (49 U.S.C.A. 41) provides in pertinent part as follows:

> "* * * *it shall be unlawful for any* person, persons or *corporation to offer, grant, or give,* or to solicit, accept, or receive *any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce* by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof *whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier,* as is required by said Act

to regulate commerce and the Acts amendatory thereof, *or whereby any other advantage is given or discrimination is practiced.* * * *" (Emphasis supplied)

The Government in its complaint alleges that the delayed lumber service offered and given by the defendant without charge constitutes the extension to "roller" lumber shippers and wholesalers of privileges and facilities in the transportation of property which are not specified in the published tariffs, in violation of Section 6(7) of the Interstate Commerce Act above quoted.

The Government also alleges that such delayed lumber service constitutes the granting and giving of concessions and discriminations whereby lumber is transported in interstate commerce at less than published tariff rates, and whereby advantages and discriminations are practiced in favor of the transit lumber shipper or wholesaler, in violation of Section 1 of the Elkins Act above quoted.

On the other hand, the defendant contends that there are no provisions of the Interstate Commerce Act, and no rules or regulations of the Interstate Commerce Commission, requiring that railroad carriers publish in tariff form a schedule showing the length of time required for shipments of lumber. Defendant maintains that it delays lumber shipments en route only to meet the competition of the longer, more circuitous routes of other competing carriers.

Defendant further maintains that the entire matter here under consideration is under the exclusive jurisdiction of the Interstate Commerce Commission in that it is an administrative problem to be determined by the Commission.

Section 6(1) of the Interstate Commerce Act (49 U.S.C.A. 6(1)) requires all common carriers to file with the commission and keep open for public inspection schedules showing all the "rates, fares, and charges for transportation between different points on its own route" and points on other routes when a joint rate has been established. It further provides that said schedules "shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect or determine any part or the aggregate of such aforesaid rates, fares and charges, or the value of the service rendered to the passenger, shipper, or consignee."

In its argument, defendant states that it is clear from the basic allegations of the complaint and the suspension order of October 27, 1958, that the Commission's own investigation "covers the dominant facts alleged in the present case as constituting a violation" of the Interstate Commerce Act and the Elkins Act. Defendant goes on to state that the real basic and fundamental questions in both the case at bar and in the Commission's investigation which is now in progress are:

(1) Whether the published tariff rates admittedly collected and retained by the defendant are "just and reasonable for both the fast and the slow service performed by the defendant, and that is a question of fact for the Commission's determination under Section 1(5) of the Interstate Commerce Act; (2) whether defendant's performance of both services at the same published rates and charges is just and reasonable "practice," and that is a question of fact for the Commission's decision under Sections 1(6) and 15(1) of said Act; (3) whether,

in performing both fast service and slow service for all shippers alike at their request, for the same published tariff rates and charges, defendant may be deemed guilty of "unjust discrimination," and that is a question of fact for the Commission's decision under Section 2 of said Act; (4) whether performance of both fast and slow service for all shippers alike for the same published tariff and charges causes an "undue or unreasonable preference or advantage," or any "undue or unreasonable prejudice or disadantage," and that is a question of fact for the Commission's decision under Section 3 of said Act; and (5) whether the slow service at published rates for all shippers alike, but without description of the service in the published tariffs, in fact, constitutes "privileges" not specified in the tariffs within the prohibition of Section 6(7) of said Act, and that is a question of fact for the Commission's decision under Section 6(1) of said Act, which requires railroads to publish "all other charges which the Commission may require."

Briefly stated, defendant is attempting to invoke the doctrine of "primary jurisdiction," which provides that when Congress has created an administrative commission, board, or other agency with jurisdiction over and power to regulate some particular field of endeavor, courts cannot grant relief to any person complaining of any act done or omitted to have been done if the act or omission is of such nature as to be within the sphere of regulation of the administrative agency involved. Adler v. Chicago & Southern Air Lines, D. C. Mo., 41 F. Supp. 366.

In his excellent work on Administrative Law, Professor Davis has stated that the "fountainhead from which the entire primary jurisdiction doctrine flows" is the case of Texas & Pacific R. Co. v. Abilene Cotton Oil

Co. (1907), 204 U. S. 426, 27 S. Ct. 350, 51 L. Ed. 553. After discussing said case, he states:

> "Questions which the courts call 'law' may appropriately be determined in the first instance by courts, because uniformity may be secured through review by a single Supreme Court, but the unifying influence of that Court can reach neither factual determination nor the exercise of specialized judgment. The line of cleavage is probably best stated by Mr. Justice Brandeis in Great Northern R. Co. v. Merchants Elevator Co. (259 U. S. 285, 291, 42 S. Ct. 477, 479, 66 L. Ed. 943 (1922)). 'Whenever a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission . . . To determine what rate, rule or practice shall be deemed reasonable for the future is a legislative or administrative function. To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function. Preliminary resort to the Commission is required alike in the two classes of cases. It is required because the enquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts. But what construction shall be given to a railroad tariff presents ordinarily a question of law which does not differ in character from those presented when the construction of any other document is in dispute.'
>
> "In the Merchants case, the only question was the meaning of non-technical words in a tariff; there being no question of fact and no question requiring expert judgment, the Court held that preliminary resort to the Commission was unnecessary." Davis, Administrative Law Treatise, Vol. 3, Sec. 19.02.

It must be borne in mind that the Elkins Act is supplementary legislation to the Interstate Commerce Act. It is, in other words, part and parcel of the same specific, comprehensive, statutory scheme which Congress has enacted concerning the regulation of interstate commerce.

Specific authority has been given to the Courts to act in a situation such as that existing in the case at bar. Section 3 of the Elkins Act (43 U.S.C.A. 43) provides in pertinent part:

> "Whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discriminations forbidden by law, a petition may be presented alleging such facts to the district court of the United States sitting in equity having jurisdiction; * * * whereupon it shall be the duty of the court summarily to inquire into the circumstances, * * * and upon being satisfied of the truth of the allegations of said petition said court shall enforce an observance of the published tariffs or direct and require a discontinuance of such discrimination by proper orders, writs, and process * * *."

In the case under consideration the Interstate Commerce Commission has administratively decided that defendant's deliberate slow lumber service is in violation of Section 1 of the Elkins Act and Section 6(7) of the Interstate Commerce Act and has requested the Attorney General to direct the District Attorney to institute this case. The statutory language places the duty of inquiry upon the Court, and empowers the Court to enforce its decision by proper order.

In Great Northern R. Co. v. Merchants Elevator Co., referred to in the above quotation from Professor Davis' treatise, the Supreme Court held that where the question is simply one of tariff construction the courts may pass on it as an issue "solely of law." This doctrine was affirmed by the Supreme Court in the case of United States v. Western Pacific R. Co. (1956), 252 U. S. 59, 77 S. Ct. 161, 1 L. Ed 2d 126, wherein the Court stated:

> "By no means do we imply that matters of tariff construction are never cognizable in the courts. We adhere to the distinctions laid down in *Great Northern R. Co. v. Merchants Elevator Co.*, supra, which call for decision based on the particular facts of each case. Certainly there would be no need to refer the matter of construction to the Commission if that body, in prior releases on opinions, has already construed the particular tariff at issue or has clarified the factors underlying it."

In the case of City of Younkers v. United States (1944), 320 U. S. 685, 64 S. Ct. 327, 88 L. Ed. 400, the Supreme Court, while deciding that the commission should make jurisdictional findings under Section 1(22) of the Interstate Commerce Act relative to abandonments of rail lines or its order thereunder should be set aside on review by the courts, nevertheless pointed out:

> "It is settled that the aid of the Commission need not be sought before the jurisdiction of a court is invoked to enjoin violations of the provisions in question. Texas & Pacific Ry. Co. v. Gulf, C. & S. Ry. Co., 270 U. S. 266."

By the same token, there is no reason why the aid of this Court cannot be invoked to enjoin violations of Section 6(7) of the Act.

Referring to the quoted language in United States v. Western Pacific R. Co., supra, it is apparent that the

Interstate Commerce Commission has "already construed the particular tariff at issue or has clarified the factors underlying it."

In Chicago, Milwaukee, St. Paul & Pacific Railroad v. Spokane, Portland & Seattle Railway Company, et al. (May 1957), 300 I.C.C. 453, at 487, where the question involved was the establishment of certain routes and rates, the Commission stated:

> "We have never condemned reasonable transit or diversion privileges, such as stopping for partial unloading and unloading, the diversion of a car from one destination to another, stopping for milling or fabrication, or storage, where the nature and sale of a commodity require such privileges, but the improper use of freight cars has been looked upon with disfavor. While it is not within our province to pass upon the respective merits of the two methods of merchandising lumber; namely, firm sales and transit sales, the deliberate routing of traffic so as to slow the movement thereof is a practice which cannot be regarded as in the public interest."

As early as 1917, the Commission stated in Reconsignment Case, 47 I.C.C. 590, at pages 623-624:

> "Retail lumber dealers, with investments in yards and stock aggregating many millions of dollars, appeared in active support of the proposed charges for reconsigning lumber. Their position is that the exaction of the same freight rates on their direct shipments as are charged the wholesale dealers for transportation between the same points, with the additional service of reconsignment, is discriminatory. They allege that under present practices the wholesale dealers are permitted to use without expense to them the railway equipment and yards for the storage of their stocks, while the retail dealers must provide their own storage facilities at great ex-

pense. The fact that shippers are able to derive an advantage over competitors through the service of the carriers is, of course, not in itself a reason for condemning a transportation practice. *It is alleged, however, that shipments are delayed through causes not arising from transportation. When a shipment reaches a hold point unsold and the market is rising, the dealer has an incentive to hold his shipment awaiting a further advance in price. On a falling market, on the other hand, the customer defers his purchase. In either case, it is said, the car is detained, the terminal congested, and other shippers deprived of the use of the carrier's equipment and other facilities. Delays arising from such causes are to be unqualifiedly condemned.* The fact that many of the wholesale lumber dealers reconsign practically all of their shipments, while the eastern grain dealers, whose situation has been discussed, reconsign only from 20 percent to 25 percent of their shipments, indicates a radically different cause and purpose of the reconsignments in connection with the two classes of traffic. The possibility of such results of the carriers' present practices supports the belief that adequate compensation for the full period of detention awaiting orders and, if necessary, a penalty in addition, are in the public interest." (Emphasis supplied)

In the Export Grain Storage Charges Case (1917), 42 I.C.C. 530, the Commission considered the holding of grain cars in transit at the request of shipper, just as lumber cars are held in the instant case. The Commission stated that such holding of cars was an "extra service" for which a charge should be made.

In American Paper & Pulp Association v. B. & O. R. R. Co., 41 I.C.C. 506, the Commission stated:

"In order to prevent overcharges and discriminations under the pretext of additional services, Con-

gress enacted in Section 1 that the entire body of such service, many of them, according to the theory of the common law, separable from the carrier's service as carrier, should be included within the single term 'transportation' and be subject to the provisions of the act respecting reasonable rates and the like. And by Section 6 no carrier may extend 'any privileges or facilities,' save as these have been duly specified. *But the primary duty of a carrier is to carry. And it is not the duty of a carrier, as such to furnish storage* beyond the reasonable time necessary for unloading or removal. * * * *A rule which permits the shipper to use valuable facilities of the carrier for unlimited periods, while seeking to find markets for the goods stored or while awaiting the convenience of the consumer, is not a proper rule, and the practice, as complainant charges, is beyond the functions of a common carrier.*" (Emphasis added)

In the case of Turner, Dennis & Lowry Lumber Co. v. Chicago, M. & St. P. Ry. Co., 2 F. 2d 291, 296, and 271 U. S. 259, 262, both the District Court and the Supreme Court condemned the use of freight cars for the storage of lumber while the shipper sought a market. Both courts pointed out that such storage constituted privileges and advantages to the shipper beyond the ordinary duties of a carrier.

The District Court in that case stated:

"It appears in this case that a great shortage of cars existed; that this evil was increased by the practice of a large body of lumber dealers to detain cars for an unreasonable period while they were negotiating sales to be effected through reconsignments. From the report of the Commission in this case (American Wholesale Lumber Ass'n v. Director General, 66 Interst. Com. Com'n R. at page 406), it appears complainants insisted that:

"Operators of the small mill, who are limited as to capital and credit, are unable to carry lumber in stock for long periods; that it is impossible for them to sell on credit; that their limited output will not warrant the heavy cost of a sales organization; that they are unacquainted with traffic matters and market conditions; that they must ship their lumber as soon as it is available and must realize their return quickly; and that therefore it is vital to the continuance of their business to have the right to reconsign without any restriction of that right by the imposition of a penalty charge when cars are delayed beyond a specified limit.

"It was also urged upon the Commission:

"That the unrestricted use of the reconsignment privilege is beneficial to the small lumber retailer in that, by being able to purchase cars of lumber in transit, quickly available to meet his needs, he requires less capital and less yard space, and can maintain a better rounded as well as a smaller stock on hand," etc.

"It is evident from this that by such use of railway facilities such dealers sought to escape the natural disadvantage of small capital and inadequate facilities of their own. Of such reasons the law can take no cognizance. It does not seek to equalize natural conditions by special privileges and advantages to an individual shipper or class of shippers. The framers of the Demurrage Code refused to allow the circumstances of the particular shipper to be considered and refused to exempt shippers from demurrage charges because of conditions peculiar to them. Pennsylvania R. R. Co. v. Kittanning Co., 253 U. S. 323, 324, 40 S. Ct. 532, 64 L. Ed. 928; Texas & Pacific Ry. Co. v. Interstate Commerce Commission, 162 U. S. 197-218, 16 S. Ct. 666, 40 L. Ed. 940. The Carrier is not called upon to contribute its trackage and equipment for such purposes, nor is the shipping public required to suffer the resulting loss of transportation facilities."

The Supreme Court, in affirming the lower court's decision, stated:

> "Preliminary resort to the Interstate Commerce Commission was unnecessary, because no administrative question is presented. *Great Northern Ry Co. v. Merchants Elevator Co.*, 259 U. S. 285."

and:

> "One cause of undue detention is lack of promptness in loading at the point of origin or in unloading at the point of destination. Another cause is diversion of the car from its primary use as an instrument of transportation by employing it as a place of storage, either at destination or at reconsignment points, for a long period while seeking a market for the goods stored therein. To permit a shipper so to use freight cars is obviously beyond the ordinary duties of a carrier."

The defendant in the instant case maintains and argues that it must delay lumber shipments to meet the competition of the other carriers with longer lines. But is this necessarily true? Even if the longest circuitous route were taken between a point in the Northwest and Council Bluffs, Iowa, would it require 14 more days in transit than a direct shipment over defendant's lines? It does not appear to the Court that such would be the case. The longest route would be something around 1,000 miles longer than defendant's direct route, and the evidence before the Court is that the normal running time between Ogden, Utah, and Council Bluffs, Iowa, a distance of some 900 miles, is from 2 to 4 days.

Also, if the delay being practiced by defendant is only to meet competition, why have some six other competing carriers published tariffs (which have been suspended pending a hearing) in which they, too, are seeking

to provide a 14-day delay for shipments of lumber without charge? It seems more reasonable to this Court that not only the defendant, but also the competing carriers with longer lines, are trying to favor those small mills and wholesalers who do not have storage facilities of their own.

In the case of Chicago & Alton Railroad Company v. Kirby, 225 U. S. 155, the Court, after reciting the provisions of Section 1 of the Elkins Act, stated:

> "The implied agreement of a common carrier is to carry safely and *deliver at destination within a reasonable time. It is otherwise when the action is for a breach of a contract to carry within a particular time,* or to make a particular connection, or to carry by a particular train. The railroad company, by its contract, became liable for the consequence of a failure to transport according to its terms. Evidence of diligence would not excuse. If the action had been for the commonlaw carrier liability, evidence that there had been no unreasonable delay would be an answer. But the company, by entering into an agreement for expediting the shipment, came under a liability different and more burdensome than would exist to a shipper who made no such special contract.
>
> "*For such a special service* and higher responsibility *it might clearly exact a higher rate. But to do so it must make and publish a rate open to all. This was not done.*
>
> "The shipper, it is also plain, was contracting for an advantage which was not extended to all others, both in the undertaking to carry so as to give him a particular expedited service, and a remedy for delay not due to negligence.
>
> "*An advantage accorded by special agreement which affects the value of the services to the shipper and its*

cost to the carrier should be published in the tariffs, and for a breach of such a contract, relief will be denied, because *its allowance without such publication is a violation of the act.* It is also illegal because it is an undue advantage in that it is not one open to all others in the same situation.

"The broad purpose of the Commerce Act was to compel the establishment of reasonable rates and their uniform application. That purpose would be defeated if sanction be given to a special contract by which any such advantage is given to a particular shipper as that contracted for by the defendant in error. *To guarantee* a particular connection and *transportation by a particular train, was to give an advantage or preference not open to all and not provided for in the published tariffs.* The general scope and purpose of the act is so clearly pointed out in New York, N. Y. & H. Railroad Company v. Interstate Commerce Com., 200 U. S. 361, 391 and in Texas & P. Railroad Company v. Abilene Cotton Oil Co., 204 U. S. 426, as to need no reiteration.

"That the defendant in error did not see and did not know that the published rates and schedules made no provision for the service he contracted for, is no defense. For the purposes of the present question he is presumed to have known. The rates were published and accessible, and, however difficult to understand, *he must be taken to have contracted for an advantage not open* to others. Texas & P. Railway Co. v. Mugg, 202 U. S. 242."

While the *Kirby* case involved an agreement for expedited service, the principles laid down therein were cited in Eastern Shore of Va. P. Exch. v. New York, P. & N. R. Co. (1925), (S. C. Ap. Va.), 126 Southeastern 674, holding that under Section 1 of the Elkins Act it was unlawful for a carrier to *delay* the arrival of shipments to give a shipper the advantage of a better market price. The Court said:

"No special rate has been shown to have been published for special contracts to delay shipments, and hence no shipments could legally be delayed.

"If it is unlawful to contract to expedite a shipment, it is unlawful to contract to delay it."

It might be argued no one is hurt by delaying a shipment because the ultimate consumer of the lumber cannot complain because the cost of the lumber he buys is exactly the same, insofar as the cost of transportation of the lumber is concerned, whether the lumber is shipped in the normal course of business or in a delayed shipment. This may be true, but who does ultimately pay for the delayed service? The defendant carrier admits that the transportation cost of a delayed shipment is greater than that of a normal shipment, and the evidence submitted to the Court discloses that the increased costs over a period of time amount to a very substantial sum. Someone has to pay for the increased costs, and it appears to the Court that the general public, when shipping anything or when buying anything shipped by the defendant, must ultimately pay for the increased cost of operating the defendant railroad.

It is obvious to the Court that the giving a delayed service must be of some advantage to the "roller lumber" dealer. Why else would he ask for the delayed service? The giving of an advantage is prohibited by Section 1 of the Elkins Act. The extension to any shipper of any privileges or facilities in the transportation of property, without specifying same in the published tariffs, is prohibited by Section 6(7) of the Interstate Commerce Act.

Defendant maintains that it does not have to publish its delayed service schedules in tariff form. With this contention this Court cannot agree. If the defendant does not have to publish that it will delay shipments for

a period of 14 days, what would prevent the defendant from offering a delay of 30, 60 or 90 days?

It is the function of the Interstate Commerce Commission to determine whether or not a delay in service is reasonable under all the facts and circumstances involved. Perhaps in certain instances, a delay in service would be reasonable in order to meet the competition of competing carriers with longer physical routes. But how can the Interstate Commerce Commission ever rule upon the reasonableness of some proposed delay in service if it is never published? The Commission must have some proposed tariff presented before it can rule upon same; otherwise the question never would be properly before the Commission.

This Court wants it to be clearly understood that it is not hereby holding that the 14-day delay in service now being practiced by the defendant is unreasonable. What this Court is holding is that any intentional delay in service offered by defendant must be published in tariff form, so that the Interstate Commerce Commission can then determine if such delay is reasonable or unreasonable under the circumstances.

This Court therefore makes the following:

CONCLUSIONS OF LAW

1.

This Court has jurisdiction of the subject matter and of the parties.

2.

The defendant's offering, agreeing upon and giving of delayed lumber service to certain transit wholesalers and dealers in lumber for the purpose of inducing said transit lumber wholesalers and dealers to ship upon defendant's lines to the exclusion of competitors, and each and all of

such acts constitute a device for the offer and gift of rebates, concessions, advantages, and discriminations in violation of the Elkins Act, whereby the lumber transit shippers have been offered and given and will be offered and given concessions which enable and will enable them to transport freight in interstate commerce by common carrier by railroad at less than the published rates on file with the Interstate Commerce Commission and whereby such transit shippers of lumber have been given and will continue to be given advantages, and whereby discrimination is practiced in favor of such transit lumber shippers, all in violation of the Elkins Act.

Title 49, U. S. C., Section 41.

Chicago and Alton Railroad Company v. Kirby, 225 U. S. 155.

Eastern Shore of Va. P. Exchange v. New York, P. & N. R. Co. (1925) (S. C. Ap. Va.), 126 Southeastern 674, 676.

Louisville & Nashville Railroad Company v. Warren County Strawberry Growers Association (1925), 267 S. W. 551, 552.

Davis v. Cornwell (1925), 264 U. S. 560.

United States v. Michigan Portland Cement Co., 270 U. S. 521, 522, 524.

Baltimore and Ohio R. R. Co. v. United States, 305 U. S. 507.

United States v. Koenig Coal Co., 270 U. S. 512.

Pennsylvania R. Co. v. International Coal Mining Co., 230 U. S. 184.

3.

The defendant's giving of delayed lumber service to certain transit wholesalers and dealers in lumber for the purpose of inducing said transit wholesalers and dealers to ship upon defendant's lines to the exclusion of com-

petitors, constitutes a device by which defendant extended and will continue to extend to lumber transit shippers, privileges and/or facilities in the transportation of property such as are not specified in published tariffs, such acts being in violation of Section 6(7) of the Interstate Commerce Act and Section 1 of the Elkins Act.

Title 49, U. S. C., Section 6(7), 41.

Penna. R. R. Co. v. International Coal Mining Co., 230 U. S. 184, 196, 197.

Chicago & Alton Railroad Company v. Kirby, 225 U. S. 155.

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Atchison, T. & S. F. Ry. Co. v. Springer (1949), 172 Fed. 2d 346, 350.

Siebert v. Erie R. Co. (1919), 179 N. Y. S. 136, 189 App. 586, Affd, 1921, 134 N. E. 553, 232 N. Y. 517.

Louisville & Nashville R. Co. v. Warren County Strawberry Growers Assn., 267 S. W. 551, 552.

Turner, Dennis & Lowry Lumber Co. v. Chicago, Milwaukee & St. Paul Railway Co. (1926), 271 U. S. 259, 262.

4.

The defendant's claimed defense that its granting of delayed lumber service was the result of competitive necessity, provides no legal defense to this action.

Turner, Dennis & Lowry Lumber Co. v. Chicago, M. & St. P. Ry. Co., 2 F. 2d 291, 296, Affd, 271 U. S. 259.

Chicago, St. P. M. & O. Ry. Co. v. U. S., 162 F. 835, cert. denied 212 U. S. 579.

Wisconsin Central Ry. Co. v. U. S., 169 F. 76.

Chicago, B. & Q. R. Co. v. U. S., 98 F. Supp. 119, 122, Affd., 342 U. S. 845.

Allowances on Cottonseed at Columbus & Greenville Railway Points, 238 I. C. C. 309, 315, sustained in *Interstate Commerce Commission, et al. v. Columbus & Greenville Ry. Co.*, 319 U. S. 551.

5.

The defendant's claimed defense that delayed lumber service is a matter of long established custom, provides no legal defense to this action.

A. C. L. R. Co. v. Clinchfield Fuel Company (D.C., S. C. 1951), 94 Fed. Supp. 992.

Eastern Shore of Va. P. Exch. v. New York, P. & N. R. Co. (1925), 126 S. E. 674, 676.

6.

The purpose of the Interstate Commerce Act and the Elkins Act was to outlaw every subterfuge, plan, scheme, or device formulated by or participated in by any person or corporation to give rebates, concessions, advantages, and discriminations to shippers in respect to interstate transportation by carriers subject to the Elkins Act and the statutes were designed to strike down every device without exception no matter how ingenious or labyrinthian, by which these objectives are sought to be accomplished. These statutes are intended to strike through all forms, pretenses, and subterfuges to reach and eradicate the forbidden evil.

Armour Packing Co. v. United States, 209 U. S. 56.

United States v. Koenig Coal Co., 270 U. S. 512, 519.

Louisville & Nashville R. R. Co. v. Mottley, 219 U. S. 467, 478.

United States v. Hocking Valley R. R. Co., 194 Fed. 234.

The present proceeding is civil in nature, and the acts complained of—whether done willfully or not—may be restrained and enjoined as to the future.

United States v. Union Stock Yards, 226 U. S. 286.

Union Pacific R. Co. v. United States, 313 U. S. 450.

A permanent injunction should issue as prayed for in the complaint.

Upon the foregoing findings of fact and conclusions of law the court directs that a judgment be entered for a permanent injunction and that a form of entry be prepared by counsel for the plaintiff in accordance with the views indicated by the Court, and said form submitted to the Court.

/Sgd/ Edwin R. Hicklin
Edwin R. Hicklin
United States District Judge

Dated this 28th day of March, 1959.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
WESTERN DIVISION

CIVIL ACTION NO. 1-299

UNITED STATES OF AMERICA,
Plaintff,

vs.

UNION PACIFIC RAILROAD COMPANY,
Defendant.

ORDER GRANTING SUMMARY JUDGMENT

Both the plaintiff and the defendant have filed Motions for Summary Judgment pursuant to Rule 56 of the Rules of Civil Procedure, and the Court after an examination of all the proceedings, affidavits, certified public documents, briefs submitted and all proceedings had herein, and after hearing oral arguments of counsel and after being fully advised of all the facts and legal issues in this matter, finds that there is no genuine issue as to any material fact in this cause and that plaintiff should be entitled to a Summary Judgment as a matter of law. The Court has filed its Findings of Fact and Conclusions of Law herein.

IT IS THEREFORE ORDERED AND ADJUDGED that plaintiff's Motion for Summary Judgment be, and the same is hereby granted, that an Order for an Injunction will be entered accordingly and that plaintiff shall recover its costs and charges in this behalf expended and have execution therefor if such costs and charges are not paid within thirty days.

IT IS FURTHER ORDERED AND ADJUDGED that defendant's Motion for Summary Judgment be, and the same is hereby denied.

Dated this 3rd day of April, 1959.

/Sgd/ Edwin R. Hicklin
Edwin R. Hicklin
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
WESTERN DIVISION

CIVIL ACTION NO. 1-299

UNITED STATES OF AMERICA,
Plaintff,

vs.

UNION PACIFIC RAILROAD COMPANY,
Defendant.

ORDER GRANTING INJUNCTION

This matter having come on for hearing on January 30, 1959 on plaintiff's Motion for Summary Judgment and defendant's Motion for Summary Judgment, and plaintiff appearing by Roy L. Stephenson, U. S. District Attorney, John C. Stevens, Assistant U. S. District Attorney, and Danial M. O'Donoghue, Attorney for the Interstate Commerce Commission, and defendant appearing by E. B. Collins, Elmer B. Hobbs, James H. Anderson and Addison C. Kistle, and the Court after having considered the pleadings, affidavits, certified public documents, briefs of counsel and their oral arguments, has issued its Order Granting Summary Judgment to the plaintiff. Pursuant thereto, the Court finds that an injunction should be issued in accordance with the prayer of the Complaint of plaintiff as hereinafter set forth.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that:

1. The Union Pacific Railroad Company, defendant, and its officers, agents, and servants be and they are hereby permanently enjoined and restrained from offering, granting and giving delayed lumber freight service,

except as provided for in paragraph (1) of this Order, either directly or indirectly, by or through any means or device whatsoever, and from pursuing any course of conduct having the purpose or effect of continuing or renewing violations of Section 1 of the Elkins Act (49 U. S. C. 41) or Section 6(7) of the Interstate Commerce Act (49 U. S. C. 6(7)) whereby lumber shipments are intentionally delayed at the request of a shipper or other person, thereby giving to such shipper or other person advantages, privileges, and facilities in said transportation of lumber.

2. The Union Pacific Railroad Company, defendant, and its officers, agents, and servants be and they are hereby permanently enjoined and restrained from extending to any shipper or person any privileges or facilities of delay in the transportation or delivery of shipments of lumber, unless and until such time, if at all, as there is in force with respect to the Union Pacific Railroad Company, defendant, a tariff lawfully on file with the Interstate Commerce Commission naming the rates and charges for such privileges and facilities.

Dated this 3rd day of April, 1959.

/Sgd/ Edwin R. Hicklin
Edwin R. Hicklin
United States District Judge

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 98

UNION PACIFIC RAILROAD COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA, WESTERN DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16 of the Revised Rules of this Court, the United States moves that the judgment of the United States District Court for the Southern District of Iowa, Western Division, be affirmed.

OPINION BELOW

The opinion of the district court (J.S. App. 12–27) is not yet reported.

JURISDICTION

This suit was brought by the United States pursuant to § 3 of the Elkins Act (49 U.S.C. 43) to enjoin alleged violations by the Union Pacific Railroad of § 6(7) of the Interstate Commerce Act (49 U.S.C. 6(7)) and § 1 of the Elkins Act (49 U.S.C.

41). The district court entered a final decree granting the relief sought on April 3, 1959 (J.S. App. 34–35). Notice of appeal was filed in the district court on April 10, 1959. The jurisdiction of this Court rests upon 49 U.S.C. 43 and 45.

QUESTIONS PRESENTED

1. Whether, under § 6(7) of the Interstate Commerce Act and § 1 of the Elkins Act (49 U.S.C. 6(7), 41)—which forbid the furnishing of "privileges or facilities" not authorized by tariff, the transporting of property at less than the filed rate, and the giving of a "concession" to the "advantage" of a shipper—a carrier may, without having specified such service in its filed tariff, intentionally delay a shipment in order to afford the shipper additional time in which to find a buyer for the commodity and reconsign the shipment.

2. Whether an action under § 3 of the Elkins Act (49 U.S.C. 43), brought by the United States at the request of the Interstate Commerce Commission to enjoin a carrier from offering services not provided for in its filed tariff unless and until a new tariff specifying such services has been filed with the Commission and become effective, invades the primary jurisdiction of the Commission.

STATUTES INVOLVED

Sections 6(1) and 6(7) of the Interstate Commerce Act (24 Stat. 380, as amended, 49 U.S.C. 6(1), 6 (7)) and §§ 1 and 3 of the Elkins Act (32 Stat. 847, 848, as amended, 49 U.S.C. 41, 43) are set forth in pertinent part in the Appendix, *infra,* pp. 17–19.

STATEMENT

At the request of the Interstate Commerce Commission, the United States commenced this action seeking an injunction to restrain the Union Pacific Railroad from violating § 6(7) of the Interstate Commerce Act and § 1 of the Elkins Act (*infra*, pp. 17–18). The alleged violations were grounded on the railroad's practice of extending to transit lumber shippers and wholesalers privileges and facilities in the transportation of property not specified in the Railroad's tariffs and the practice of granting and giving concessions, advantages and discriminations prohibited by statute. The relevant facts are as follows:

1. Numerous small lumber mills in the Northwest area of the United States, mainly Northern California, Oregon and Washington, use the so-called "roller" method of lumber marketing, in which a negotiable instrument covering the shipment is turned over to wholesalers or brokers who endeavor to locate a purchaser while the lumber shipment is moving eastward. When a sale is consummated the transfer to the buyer is accomplished through diversion or reconsignment instructions to the railroad while the shipment is en route (J.S. App. 2–3).

Most of this lumber moves to markets East of the Missouri and Mississippi Rivers over lines and routes of several railroads which directly serve the Northwest area and which, with connecting lines, form numerous through routes to the lumber markets. The Union Pacific Railroad has the shortest physical route to these markets and therefore is able to deliver the lumber under certain conditions in the shortest time

(J.S. App. 3). Other railroads competing with Union Pacific for this lumber business have, in varying degree, longer physical routes, and the delivery of lumber thus takes a proportionately longer time over their routes (J.S. App. 3).

Following World War II, lumber shippers increasingly shipped by the longer circuitous routes in order to gain additional time in which to find a market for the lumber which was in transit. In order to meet the competition of the longer and therefore more time-consuming routes, Union Pacific offered to transit wholesalers of lumber a special delayed service whereby Union Pacific intentionally delayed shipments of lumber in transit on its lines in order that the lumber wholesalers might have additional time to find a market for their product (J.S. App. 4–5). The delayed service was normally accomplished by setting loaded cars out at various sidings along the main line until the shipper found a sale, whereupon the cars would be restored to normal service.[1] Although the delayed service was available to all shippers, the main users of the service were certain lumber shippers (J.S. App. 9–10). By February 1954, the delayed service schedule had been increased to 14 days (J.S. App. 6–7). Union Pacific was continuing to provide that service when this suit was instituted, and, unless

[1] For part of the period (October 1951–December 1953), the shipments were actually shipped over more circuitous routes, but shipment over the main lines, with the cars being set out on sidings, was found to be more economical (J.S. App. 6). The delayed service was suspended entirely for brief periods (July 1950–October 1951 and June 1956–December 1956) (J.S. App. 5–7).

restrained, was likely to continue to do so (J.S. App. 9).

Union Pacific has published and filed with the Interstate Commerce Commission, tariffs, rates and charges, rules and regulations governing the line haul transportation service and accessorial services, including diversion, reconsignment and demurrage, applicable to lumber and other commodities in car load lots transported from Oregon, Washington and other Western states (J.S. App. 9). Those tariffs do not specify operating time schedules or offer, or make any other provision for, slower-than-normal service (J.S. App. 9).

2. The district court found that, by its intentionally delayed service, Union Pacific contributes the use of its trackage and cars to provide a storage facility for transit lumber shippers and wholesalers and thus assumes warehousing and inventory maintenance costs for a segment of the lumber industry at no expense to the lumber dealers; that the delayed service is a device whereby transit lumber dealers avoid the payment of demurrage and obtain other advantages, such as having their lumber on wheels ready for diversion to any potential market, placing them in a superior competitive position in the marketing of lumber; that the contribution of trackage and cars to the lumber dealers results in added carrier operational problems and costs occasioned by the need for additional power and working crews; and that the delayed service entails the payment of excessive per diem costs for the use of foreign cars to the economic disfavor of Union Pacific and to the detriment of the national policy to

maintain economically stable transportation facilities (J.S. App. 7–8).

The court concluded that Union Pacific's delayed lumber service "constitutes a device by which defendant extended and will continue to extend to lumber transit shippers, privileges and/or facilities in the transportation of property such as are not specified in published tariffs" in violation of § 6(7) of the Interstate Commerce Act and § 1 of the Elkins Act (J.S. App. 28–29). The court also concluded that the delayed service is a device whereby shippers are enabled to transport lumber "at less than the published rates on file with the Interstate Commerce Commission and whereby such transit shippers of lumber have been given and will continue to be given advantages, and whereby discrimination is practiced in favor of such transit lumber shippers, all in violation of the Elkins Act" (J.S. App. 28).

Accordingly, the district court, pursuant to § 3 of the Elkins Act (*infra*, pp. 18–19), permanently enjoined Union Pacific from granting and giving delayed lumber freight service and from extending to any shipper or person any privileges or facilities of delay in the transportation or delivery of shipments of lumber, "unless and until such time, if at all, as there is in force with respect to the Union Pacific Railroad Company, defendant, a tariff lawfully on file with the Interstate Commerce Commission naming the rates and charges for such privileges and facilities" (J.S. App. 34–35).[2]

[2] On April 14, 1959, the district court, on appellant's motion, stayed its order of April 3 for a period of six months or

ARGUMENT

1. The finding that Union Pacific, by offering to shippers a delayed service not provided for in its filed tariff, violated § 6(7) of the Interstate Commerce Act (*infra,* pp. 17–18) and § 1 of the Elkins Act (*infra,* p. 18) is clearly correct.

a. Section 6(7) of the Interstate Commerce Act makes it unlawful for a carrier to "extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in" the carrier's filed tariffs.[3] Patently, the delayed service offered by Union Pacific is such a "privilege" or "facility"—to wit, the free use of the carrier's cars for storage of lumber until a sale can be found. That regular operating time schedules are not required to be filed is irrelevant. It is necessarily implicit in the tariffs that the rates apply to the carrier's "normal" service, and it is only the giving of special service—expedited or delayed—that requires additional specification.[4] Nor is it material

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until a final disposition of the appeal by this Court, "whichever is sooner."

[3] Section 6(1), in turn, requires that the filed tariff "state separately * * * all privileges or facilities granted or allowed and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee" (49 U.S.C. 6(1)).

[4] Cf. *United States* v. *Michigan Portland Cement Co.*, 270 U.S. 521, 524:

> * * * There is nothing in the statute that indicates the necessity of a published tariff which should expressly recite the fact that no unfair or unequal concession or advantage in the distribution of coal cars to shippers, or in the pri-

whether or not the service is in fact offered equally to all shippers. The purpose of requiring such services to be specified in published tariffs is to avoid the *opportunity* for discrimination by enabling each shipper to know the precise terms on which the service is offered to others and to which he is entitled. It is equally essential that such services be prescribed in the tariffs so that the Commission may have an opportunity to pass upon the reasonableness of furnishing them without extra charge.[5]

The delayed service is equally a violation of § 1 of the Elkins Act, which makes unlawful the giving of any "concession" whereby property is "by any device whatever" transported at a rate less than the tariff rate or whereby "any other advantage is given." That the "concession" of delayed service is an "advantage" given shippers follows from the same reasons that it is a "privilege or facility" forbidden to be given, without tariff provision, by § 6(7) of the Interstate Commerce Act. So also it is a device for transporting property at less than the tariff rates. The furnishing of additional services not required to be given for the tariff rate is necessarily a *pro tanto* re-

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ority of their shipment, should be afforded. The fact that the advantage or discrimination is unlawful is plain from the description of its character, as shown in this indictment, without reference to the rates fixed in the tariff. * * *

[5] Appellant's claim that the delayed service was necessary to meet competition might be relevant to a determination whether a tariff provision providing for such service would be reasonable, but it can have no bearing on the necessity for specifying the service in the tariff. To the contrary, it emphasizes the significance of the special service offered and thus the importance of its being published in the tariff.

duction of the charge for the services required to be given: by giving normal services plus storage at the rate for the normal services alone, the carrier inevitably receives less for the normal services. The delay of the shipment en route can be most accurately described, indeed, as a device whereby the shipper avoids paying the demurrage charges that would be due if the cars were shipped in normal service and allowed to stand loaded at destination. The resulting discrimination against shippers who do not use the more costly delayed service but must pay the same rate for their direct shipments—plus demurrage if they fail promptly to unload the cars at destination—is obvious.

b. The decisions of this Court leave no room for doubt that the decision below is correct. Not only has the Court frequently reiterated the broad purposes of the Acts to reach any method of dealing by which advantages not provided by tariff provisions might be given,[6] but it has directly passed on and

[6] "The all-embracing prohibition against either directly or indirectly charging less than the published rates shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about. * * *" *New York, N.H. & H.R. Co.* v. *ICC*, 200 U.S. 361, 392. "The Elkins Act proceeded upon broad lines and was evidently intended to effectuate the purpose of Congress to require that all shippers should be treated alike, and that the only rate charged to any shipper for the same service under the same conditions should be the one established, published and posted as required by law. * * * [T]he intention was to prohibit any and all means that might be resorted to to obtain or receive concessions and rebates from the fixed rates, duly posted and published." *Armour Packing Co.* v. *United States*, 209 U.S. 56, 72. See also *Union Pacific R. Co.* v. *United States*, 313 U.S. 450, 461–462.

condemned practices closely analogous to that here. Thus, in *Chicago & Alton R. Co.* v. *Kirby,* 225 U.S. 155, the Court held that a special contract to transport a car by a particular train, or on a particular day, was illegal when not provided for in the filed tariff (pp. 165–166):

> * * * the company, by entering into an agreement for expediting the shipment, came under a liability different and more burdensome than would exist to a shipper who made no such special contract.
>
> For such a special service and higher responsibility it might clearly exact a higher rate. But to do so it must make and publish a rate open to all. This was not done.
>
> * * * * *
>
> * * * To guarantee a particular connection and transportation by a particular train, was to give an advantage or preference not open to all and not provided for in the published tariffs. * * *

In *Baltimore & Ohio R. Co.* v. *United States,* 305 U.S. 507, 526, the Court held that offering in-transit warehousing to shippers at a non-compensatory rate resulted, in effect, in lowering the receipts for the transportation itself to less than the tariff rate and thus violated §6(7) of the Interstate Commerce Act. *A fortiori,* offering free storage in cars set out on sidings en route results in an effective rate less than the tariff rate. And that the delay in shipment cannot be deemed an incidental aspect of the service provided for in the tariffs is established by this

Court's comments on an almost identical practice of allowing cars to be detained to meet the needs of lumber shippers in *Turner, Dennis & Lowry Lumber Co.* v. *Chicago, M. & St. P. Ry. Co.*, 271 U.S. 259, 262:

> One cause of undue detention * * * is diversion of the car from its primary use as an instrument of transportation by employing it as a place of storage, either at destination or at reconsignment points, for a long period while seeking a market for the goods stored therein. To permit a shipper so to use freight cars is obviously beyond the ordinary duties of a carrier. * * *

The state courts have also uniformly held illegal substantially identical practices not provided for by tariff, such as intentionally delaying the arrival of shipments to give the shipper the advantage of a better market price,[7] agreeing to leave a car temporarily on a siding en route solely to accommodate the ship-

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[7] *Eastern Shore* v. *New York, P. & N.R. Co.*, 141 Va. 611, 616. No special rate has been shown to have been published for special contracts to delay shipments, and hence no shipments could legally be delayed.

If it is unlawful to contract to expedite a shipment, it is unlawful to contract to delay it * * *. These cabbages were not diverted to another market, but the device adopted was one to delay their arrival in the market to which they were originally billed.

The possibility of discrimination between shippers, to delay one shipper's goods and to forward another's, is as great in this case as it is in case of a special contract to expedite. It is clearly unlawful and custom could not make it lawful.

per,[8] or agreeing to deliver a shipment within a specified time.[9]

2. Appellant's contention that the action of the district court invaded the "primary jurisdiction" of the Interstate Commerce Commission is without substance. The issue in this case is not whether a tariff providing for delayed service without additional charge would be reasonable or lawful, but only whether the service may be offered without being included in the tariff at all. The district court limited itself to that issue and expressly refrained from expressing any view whether the service would be rea-

[8] *Siebert* v. *Erie Railroad Co.*, 189 App. Div. 586, affirmed, 232 N.Y. 517. See also *Atchison, T. & S.F. Ry. Co.* v. *Springer*, 172 F. 2d 346, 349 (C.A. 7).

[9] *Louisville & N.R. Co.* v. *Warren County Strawberry Growers Asso.*, 206 Ky. 482, 485–486.

> * * * a carrier contracting to deliver a commodity within a specified time extends to the shipper an advantage and imposes upon itself an obligation not contemplated in the usual method of shipment. If in the tariffs of a carrier on file with the Interstate Commerce Commission there is no provision fixing the schedule of time for delivery of commodities shipped under those tariffs and if for that reason the carrier may contract with whomsoever it chooses to deliver within a specified time and decline to so contract with others with whom it may not desire to do so, the entire scheme of prevention of discrimination by carriers devised by the Federal Congress would be rendered of no value. Such shipments with delivery so contracted for would universally be given every service preference at the hands of the carrier. Such preference would be discrimination of the most pernicious character. * * * [To institute such a service] it is indispensably necessary that such be published as a part of the tariffs, and be filed with the Interstate Commerce Commission. Then such service would be open to the shipping public at large on equal terms.

sonable if provided for in a tariff (J.S. App. 27). By directing appellant to comply with the tariff filed with the Commission and to cease offering services not included in the tariff, the judgment below, far from infringing the Commission's jurisdiction, was directly in aid of that jurisdiction. The decree does no more than enjoin appellant from offering the delayed service until it files with the Commission a tariff providing for such service and the Commission has had an opportunity to pass upon its lawfulness. In short, this suit, brought at the request of the Commission itself, can best be characterized as a suit to require the carrier to invoke the primary jurisdiction of the Commission by filing a tariff providing for the challenged service.

Appellant relies heavily on the fact that six other carriers have filed with the Commission (after the commencement of this suit) tariffs providing for delayed service without additional charge and that the Commission has undertaken an investigation into the reasonableness of those tariffs.[10] That, however, only demonstrates the anomaly of appellant's position, for the effect of the injunction here is simply to require appellant to file a similar tariff and thus likewise submit to the Commission's power to determine the reasonableness of its delayed service.

Primary jurisdiction concepts, moreover, are only aids to determining Congress' presumed intent, and in this case Congress has expressly provided for suits

[10] *Lumber-Free Time Allowance at Hold Points*, Investigation and Suspension Docket No. 7050. By order dated October 27, 1958, the tariffs were suspended pending a determination of their reasonableness (J.S. App. 10).

of this character. Section 3 of the Elkins Act (*infra*, pp. 18–19), under which this suit was brought, provides that whenever the "Commission shall have reasonable ground for belief" that a carrier is performing transportation "at less than the published rates on file, or is committing any discriminations forbidden by law" an equity action may be brought by the United States in a district court, whereupon the court shall "summarily * * * inquire into the circumstances" and, if "satisfied of the truth of the allegations * * * shall enforce an observance of the published tariffs or direct and require a discontinuance of such discrimination * * *." It is the very purpose of that section to provide a summary method to enjoin practices not authorized by a filed tariff and to require the carrier to proceed before the Commission, by filing new tariffs, if it wishes to adopt practices not presently authorized in the tariffs. If, as appellant contends, the district court cannot decide whether a practice is one that must be authorized by a tariff or results in a rate less than the filed rate, even for purposes of granting what is in effect interim relief pending further proceedings before the Commission, the very object of the section to provide a summary procedure for that purpose would be defeated.

Finally, even if there were no express statutory direction for the district court to decide such issues, the issue in this case is one that would not be required to be referred to the Commission even under the general principles of primary jurisdiction. There is no need to refer to an agency a matter on which its views have already been clarified (*United States* v. *Western Pa-*

cific R. Co., 352 U.S. 59, 69), and in this case the Commission's views are abundantly clear. Not only has the Commission repeatedly condemned intentional delays of shipment to suit a shipper's needs [11] and reaffirmed those views by requesting that proceedings be instituted against appellant, but the very proceeding now pending before the Commission on which appellant so heavily relies—in which the delayed-shipment tariffs filed by six other carriers were suspended pending a determination of their reasonableness—demonstrates the Commission's view that such service is properly the subject of a tariff provision and, indeed, raises serious questions of lawfulness even when provided for in a tariff. Whatever may be the outcome of the Commission's inquiry into the reasonableness or lawfulness of affording delayed shipments at no additional cost under a filed tariff provision, there can be no room for doubt that the Commission views the furnishing of such service without a tariff provision to be plainly unlawful. To refer that issue to the Commission would be an empty formalism, affording only a further delay during which appellant could continue its unlawful acts, a delay which it was the very purpose of § 3 of the Elkins Act, by providing summary procedures, to avoid.

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[11] See, *e.g.*, *Chicago, M., St. P. & P. R. Co.* v. *Spokane, P. & S. Ry. Co.*, 300 I.C.C. 453, 487; *Railroad Operating Regulations for the Movement of Loaded Freight Cars*, 298 I.C.C. 371, 375; *Reconsignment Case*, 47 I.C.C. 590, 624; *Export Grain Storage Charges*, 42 I.C.C. 530, 543; *American Paper & Pulp Association* v. *B. & O. R.R. Co.*, 41 I.C.C. 506, 511–513. The cases are discussed in the district court's opinion at J.S. App. 19–21.

CONCLUSION

For the foregoing reasons, we respectfully submit that the appeal does not present a substantial question. The judgment of the district court should be affirmed.

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GEORGE COCHRAN DOUB,
Assistant Attorney General.
MORTON HOLLANDER,
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Attorneys.

JULY 1959.

APPENDIX

Section 6 of the Interstate Commerce Act (24 Stat. 380, as amended, 49 U.S.C. 6) provides in part:

> SEC. 6. (1) Every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation * * *. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. * * *.
>
> * * * * *
>
> (7) No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges

which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

* * * * *

Sections 1 and 3 of the Elkins Act (32 Stat. 847, 848, as amended, 49 U.S.C. 41, 43) provide in part:

SEC. 1. * * * The willful failure upon the part of any carrier subject to said Acts to file and publish the tariffs or rates and charges as required by said Acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor * * *; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. * * *

* * * * *

SEC. 3. Whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discriminations forbidden by law, a petition may be presented alleging such facts to the district court

of the United States sitting in equity having jurisdiction; and when the act complained of is alleged to have been committed or as being committed in part in more than one judicial district or State, it may be dealt with, inquired of, tried, and determined in either such judicial district or State, whereupon it shall be the duty of the court summarily to inquire into the circumstances, upon such notice and in such manner as the court shall direct and without the formal pleadings and proceedings applicable to ordinary suits in equity, and to make such other persons or corporations parties thereto as the court may deem necessary, and upon being satisfied of the truth of the allegations of said petition said court shall enforce an observance of the published tariffs or direct and require a discontinuance of such discrimination by proper orders, writs, and process, which said orders, writs, and process may be enforceable as well against the parties interested in the traffic as against the carrier, subject to the right of appeal as now provided by law. It shall be the duty of the several United States attorneys, whenever the Attorney General shall direct, either of his own motion or upon the request of the Interstate Commerce Commission, to institute and prosecute such proceedings * * *.

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No. 98

In the Supreme Court of the United States

October Term, 1959

UNION PACIFIC RAILROAD COMPANY,
Appellant,

v.

UNITED STATES OF AMERICA.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA, WESTERN DIVISION

BRIEF OPPOSING MOTION TO AFFIRM

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BRIEF OPPOSING MOTION TO AFFIRM

Pursuant to Rule 16.3 of the Revised Rules of this Court, appellant files this brief opposing the motion of the United States that the judgment of the United States District Court for the Southern District of Iowa, Western Division, be affirmed.

I.

APPELLANT'S PERFORMANCE FOR ALL SHIPPERS AT ONE AND THE SAME PUBLISHED TARIFF RATE, WHICHEVER OF TWO TYPES OF SERVICE—FAST OR SLOW—IS ELECTED BY THE SHIPPER, WITHOUT TARIFF SPECIFICATION OF OPERATING SCHEDULE OR TIME CONSUMED BY EITHER TYPE SERVICE, DOES NOT VIOLATE SECTION 6(7) OF THE INTERSTATE COMMERCE ACT OR SECTION 1 OF THE ELKINS ACT.

Appellant, in connection with other railroads, publishes tariffs naming rates and charges for hauling lumber from the Northwest to destinations in the East and

South. These tariffs do not specify the operating time schedules or whether the shipments will be hauled in a fast or slow service. The Motion to Affirm properly admits (p. 7) that "operating time schedules are not required to be filed," for there is no provision of law or any order, rule or regulation of the Commission requiring railroads to specify in tariff form their operating schedules or the type service—fast or slow—they will perform for the rate or charge published in the tariff.

To meet the needs of shippers' marketing and distribution methods and to enable it to compete with longer and greater time-consuming railroad routes, appellant has for many years offered to all shippers either a fast or a slow service for the same rate named in the published tariff applicable to the commodity shipped over appellant's routes or the longer routes (J. S. pp. 4-9). The shipper may elect either the fast or slow service as his particular shipments might require from time to time.

Although properly admitting that operating time schedules are not required to be filed in the tariffs, the Motion to Affirm argues that "expedited or delayed" service does require tariff specification and that it is immaterial that appellant offers through customary information memoranda and solicitors the two types of service equally to all shippers. Though arguing that published tariff rates necessarily apply only to "normal" service and that "expedited or delayed" service requires tariff specification as a departure from "normal" service, the argument completely overlooks the fact that appellant renders only two types of lumber service—fast and slow—and has no "standard" of "normal" service, artificially set up for the purpose of argument in the Motion to Affirm.

Appellant's fast service is no more "normal" than its slow service, and could be called an "expedited" serv-

ice in comparison with its slow service. But neither the fast nor the slow service is a "normal" or "special" service. Certainly, Counsel for the Government is not at liberty to select either the fast or the slow service and use it, in the absence of a statutory "standard," to condemn, or measure the "legal quality" of the other service. Yet, the Motion to Affirm (pp. 7-9) argues that the slow service (but not the fast service) is a "privilege" or "facility" without specification in tariffs, in violation of Section 6(7) of the Act because a shipper electing that service has for a longer time the "free use" (though at published tariff rates) of cars in which his lumber is hauled than he has if he elects appellant's fast service. But, since all shippers may, and do, elect either service, the argument is untenable for it merely is that by his election of the slow service a shipper gains an unlawful advantage over himself, and creates a discrimination against himself because he did not elect the fast service. And the argument is further untenable for it overlooks the fact that the fast service is more "expeditious" than the slow service, and is far more "advantageous" than the slow service under some conditions, as argued in cases cited in the Motion to Affirm, pages 10 and 12.

The Motion to Affirm argues that the slow service also results in concessions and advantages to shippers using that service whereby their property is transported at less than tariff rates even though the tariff rates are admittedly collected and retained by appellant. The slow service, it is argued, is "necessarily a *pro tanto* reduction of the charge for the services required to be given." But this overlooks the fact that the tariff which publishes the rate or charge for the transportation services does not and—under the Government's own admission—is not required to specify any operating schedule or the type of service offered to be performed for the published

rate. The fast service, being more expeditious, might well be more costly to appellant and advantageous to the shipper than is the slow service, and, thus, also result in the same kind of alleged reduction of the published tariff charge.

The Motion to Affirm further argues (p. 9) that the slow service results in discrimination against shippers who do not use it but must pay the same freight rate—plus demurrage—if they fail promptly to unload the cars at destination. But, as we have just demonstrated, this reasoning overlooks vital fundamentals which necessarily vitiate the argument. While the needs of some shippers may cause them to use one type of service more often than the other type, the availability of both services is not limited to any particular group of shippers but is offered to all, and the shipper who uses the fast service today might be, and often is, the same shipper who desires and uses the slow service tomorrow; or the same shipper might, and does, use both types of service for different shipments on the same day. The argument that the shippers using the fast service are discriminated against because they would have to pay demurrage *if* the shipments are not unloaded within the free time (48 hours) at destination is fallacious and untenable, for, regardless of fast or slow movement en route, demurrage is collectible on *all* shipments not unloaded within 48 hours after delivery at destination.

In arguing that, while operating time schedules for "normal" service are not required to be filed, the offering of "expedited or delayed" service must be filed in tariff form, we think the Motion to Affirm misconstrues the requirements concerning what must be filed in tariffs. While Section 6(1) of the Act requires railroads to file tariffs showing all their "rates, fares and charges for transportation" and "all privileges and facilities" which

"change, affect, or determine any part or the aggregate of such aforesaid rates, fares and charges, or the value of the service rendered to the passenger, shipper, or consignee" and further requires railroads to file and publish "all other charges which the Commission may require," there is no provision of law, and the Commission has never in the 72 years of its existence issued any order, rule or regulation expressly requiring railroads to publish their operating schedules or to state in tariff form the operating time or schedules of their trains or whether they propose to haul one train or one shipment faster than others.

While the cases cited in the Motion to Affirm abound with dicta and gratuitous statements concerning the purposes of the Interstate Commerce Act and the Elkins Act, not one of them involves facts or circumstances comparable at all with those involved in the instant case. The Government's brief quotes copiously from the dicta and academic statements in the cited cases but does not disclose the complete dissimilarity of facts which distinguish this case from those cited and make them inapplicable to the instant case.

Turner, Dennis & Lowry Lbr. Co. v. Chicago, M. & St. P. Ry. Co., 271 U. S. 259, was a suit by a shipper to recover four days' demurrage charges at ten dollars a day paid the railroad by the shipper on a carload of lumber during a car shortage. The shipper contended that the charge was unconstitutional and inflicted undue prejudice against lumber shippers. Neither Section 6(7) of the Interstate Commerce Act nor the Elkins Act was involved, nor did the case involve competition of one railroad with others, nor line-haul service by one carrier to meet competition of another, or the type service required by shippers.

Chicago & Alton R. R. Co. v. Kirby, 225 U. S. 155, was an action *in assumpsit* by one shipper to recover damages for failure of the railroad to carry out a *special agreement* with the shipper to transport one shipment of horses from Springfield to Joliet, Illinois, in time to meet a "horse special" train of the Michigan Central Railroad, due to arrive in New York at a particular time which would enable Kirby's horses to be entered in a horse sale in New York. The regular tariff rates were to be charged. The Court held the contract unlawful for the principal reason that it placed the railroad under a liability different and more burdensome than its common law liability. The Court said that for such special service and greater responsibility the railroad "might" exact a higher rate, but to do so the railroad must make and publish "a rate open to all." While the Court held that, if a higher rate were charged, it must be published, the crux of the decision clearly is that by making a special contract with Kirby for expedited service of a single shipment at the regular tariff rates a special advantage was given him which was "not open to all". That decision does not require condemnation of appellant's slow service in the instant case for that service is "open to all" through the same type of publicity or dissemination of information to shippers of all operating schedules or types of service offered to shippers by appellant, and the service is undeniably offered to and performed alike for all shippers of all traffic, including "roller" and "firm order" lumber traffic. No extra charge or higher rate is made and no tariff publication is required under the *Kirby* decision.

Eastern Shore of Va. P. Exch. v. New York, P. & N. R. Co., 126 S. E. 674, was a suit for damages based on the railroad's failure to accomplish a shipper's order to "divert" two carloads of cabbage to Jersey City instead of New York, the original destination. Recovery was denied upon the

court's holding that the diversion order amounted to a *special contract* with the one shipper to delay the shipment, and was, therefore void. It is shown by the language at page 676 that the "possibility of discrimination between shippers" was the basis of that decision. There is no such possibility of discrimination in the instant case because appellant's slow service is admittedly offered to and performed alike for all shippers of all traffic.

Louisville & N. R. Co. v. Warren County S. G. Ass'n, 267 S. W. 551, was a suit for damages upon a special contract to deliver certain carloads of strawberries at New York within 78 hours and 45 minutes and at Philadelphia within 55 hours after departure from Bowling Green, Kentucky. The court denied recovery because the special contract with the one shipper "extended a discriminatory preference to it that no other shipper enjoyed under appellant's tariffs." Although the court said that if "time of delivery" is offered as a part of the service it should be published in tariffs, it is made clear at page 552 that this was merely to make the service "open to the shipping public at large, on equal terms." In the instant case appellant's slow service is unquestionably open to the shipping public at large and does not extend any discriminatory preferences to any shipper but is performed for all shippers alike upon equal terms. The service is not the result of special contracts with individual shippers but of the customary publicized information circulars advertising the availability of the service to the shipping public at large.

Atchison, T. & S. F. Ry. Co. v. Springer, 172 F. 2d 346, was a suit by the railroad to recover 47 days' demurrage on one carload of shavings or sawdust. After the car had arrived on the consignee's sidetrack the shipper gave a "diversion" or reconsignment order to the railroad's agent which order did not conform to tariff re-

quirements because it was both verbal and conditional to the extent that it would have required the railroad employees to go on the consignee's private sidetrack, and to weigh the contents of the car. The court held the diversion order to be a nullity and ordered judgment for the railroad. The case bears no resemblance whatsoever to the case at bar.

Siebert v. Erie R. Co., 179 N. Y. S. 136, affirmed 134 N. E. 553, was a suit by a shipper to recover for the loss of certain freight from a car which had been temporarily left on a sidetrack en route "solely for the accommodation of the shipper." The court held that the agreement to leave the car on the sidetrack was unlawful and ordered judgment for the shipper. The court, at page 140, held that the agreement to extend this privilege to that shipper was unlawful because "other shippers paying the same rate for transportation" were not entitled to such accommodation under the bill of lading and tariffs of the railroad. The case does not aid the Government in the instant case because here appellant's slow service is admittedly offered to and performed for all shippers alike at exactly the same rates for transportation.

B. & O. R. Co. v. U. S., 305 U. S. 507, was a case in which the Court sustained the validity of an order of the Interstate Commerce Commission condemning as unlawful a practice of certain railroads in the Port of New York furnishing and providing warehouse space and services to shippers at less than cost to the carriers and at less than the rates charged by private warehousemen. In the instant case the appellant collects and retains the published tariff rates and charges and provides only such facilities and performs only the services that are necessary and incident to the transportation services which it offers to perform to the public at the published tariff rates.

II.

THE DISTRICT COURT ERRED IN REFUSING TO APPLY THE RULE OF PRIMARY JURISDICTION.

The Motion to Affirm (pp. 12-15) oversimplifies the case in its efforts to support the refusal of the district court to apply the rule of primary jurisdiction. The court did not issue the injunction merely to have the Commission determine the lawfulness of appellant's slow service. The Commission already had that power and duty, upon its own initiative, under Sections 13(2) and 15(1) of the Interstate Commerce Act. Instead of remanding the case to the Commission the district court proceeded to make its own administrative findings that the slow service results in an "advantage" to shippers using it and a "discrimination" against shippers who do not desire or use the slow service, and that the slow service constitutes "privileges or facilities" not specified in the published tariffs. On these administrative findings of fact the district court made conclusions of law (J. S., App. B, pp. 27-29) condemning the slow service as violations of Section 1 of the Elkins Act and Section 6(7) of the Interstate Commerce Act and the decree enjoins the asserted violations.

Thus, despite the district court's recognition that it is the Commission's function to determine whether appellant's slow service is "reasonable," and the court's denial that its decision holds that the slow service is "unreasonable" (J. S., App. B, p. 27), the court clearly usurped the Commission's administrative function by making its own determination of the "legal quality" of the slow service. The very basis of the injunction necessarily lies in the court's own findings of fact which are clearly within the exclusive primary administrative jurisdiction of the Commission. (See discussion and cases cited, J. S., pp. 16-23.)

Whether appellant may lawfully offer and perform for all shippers at their election either of two types of

service (fast or slow) for the same published tariff rate raises, among others, administrative questions of fact (1) whether the published tariff rate is a reasonable rate for both the fast and slow service, (2) whether offering both services to all shippers for the same tariff rate, but performing the slow service only for shippers electing that service, results in unlawful advantage to those shippers electing slow service and in discriminations against shippers who do not desire or elect the slow service, and, (3) whether performance for the same shipper, at his election, of fast service for some of his shipments and slow service for others of his shipments could possibly result in any unlawful advantage or discrimination.

Those are questions of fact, and not of law, which present "issues of transportation policy which ought to be considered by the Commission in the interests of a uniform and expert administration of the regulatory scheme laid down by that [Interstate Commerce] Act," *United States v. Western Pac. R. Co.*, 352 U. S. 59, 65. And for more than 50 years this Court has held that when such questions arise in a court case it is the duty of the courts "to remand the case to the Commission to enable it to perform that duty," *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 444. As stated by this Court in *General American Tank Car Corp. v. El Dorado T. Co.*, 308 U. S. 422, at pages 432-433:

> "The policy of the Act is that reasonable allowances and practices, which shall not offend against the prohibitions of the Elkins Act, are to be fixed and settled after full investigation by the Commission, and that there is remitted to the courts only the function of enforcing claims arising out of the failure to comply with the Commission's lawful orders."

As appellant competes, at the same published tariff rate, with numerous other carriers in hundreds of routes over which the lumber traffic moves from the Northwest

to the East and South, a fundamental reason why the district court should have applied the rule of primary jurisdiction in this case is "the desirable uniformity which would obtain if initially a specialized agency passed on certain types of administrative questions," *United States v. Western Pac. R. Co.*, supra, p. 64. But the Commission, the Department of Justice and the district court have simultaneously dealt with the question whether competing railroads may perform a fast and a slow service for the same rate at the election of shippers, as if to obtain results just the opposite of uniformity. Simultaneously with the filing of the instant case the Government also filed a similar action in the United States District Court for the District of Minnesota, entitled *United States of America v. Northern Pacific Railway Company*, Civil Action No. 3-57-164, which is now pending in that court; the Commission had investigated and developed the facts which lead to the filing of both actions by the Department of Justice, although the Commission had authority under Section 13(2) and Section 13(1) of the Interstate Commerce Act to conduct proceedings on its own motion, at which the defendants in the two suits and other carriers competing for the lumber traffic could have been heard, and to make such findings, requirements and orders as it deemed necessary.

While in these two court actions the Government was contending that the defendant railroads should file tariffs publishing slow service, six other railroads that compete for the lumber traffic did file tariffs with the Commission publishing a slow service which they had already performed over their lines, but the Commission promptly suspended those tariffs and now has under consideration a complete investigation for eventual decision with respect to the validity of those tariffs (J. S., p. 11). Whatever order the Commission makes in that investigation will be subject to special statutory judicial review.

Both the Motion to Affirm and the district court hold that the rule of primary jurisdiction is not applicable in this case because the Elkins Act expressly empowers the courts to issue injunctions. But decisions of this Court hold that mere existence of such power in the courts is no excuse for their refusal to stay their hands and remand a case to the Commission which was especially created by Congress to determine whether rates, rules or practices of railroads result in unlawful advantages, discriminations or other prohibited results. *General American Tank Car Corp. v. El Dorado T. Co.*, 308 U. S. 422, 433. In *United States Navigation Co. v. Cunard S. S. Co.*, 284 U. S. 474, this Court ordered an action alleging violations of the Sherman Anti-Trust Act dismissed on the ground that the matters set forth in the complaint, though stating a cause of action and furnishing ground for an injunction authorized by the anti-trust laws, were also within the exclusive administrative jurisdiction of the United States Shipping Board under the Shipping Act of 1916. At page 480 the Court said—

> "It may be conceded that looking alone to the Sherman Anti-Trust Act the bill states a cause of action under sections 1 and 2 of that act (15 USCA, §§ 1, 2) and consequently furnishes ground for an injunction under section 16 of the Clayton Act (15 USCA, § 26) unless the Shipping Act stands in the way; and this was the view of both courts below."

Far East Conf. v. United States, 342 U. S. 570, was a suit brought by the Government to enjoin alleged violations of the anti-trust laws. But this Court again ordered dismissal on the ground that the subject matter was within the administrative jurisdiction of the Federal Maritime Board, to which preliminary resort was required. Thus, application of the rule of primary jurisdiction depends not upon whether the courts have power to issue an injunction, but upon the question whether

the facts alleged present problems primarily within the jurisdiction of an agency especially created to make administrative determinations in a particular field.

The similarity between the facts and the decisions of this Court in the *Cunard* and *Far East* cases are of compelling significance. In both of those cases the Court, though clearly having injunctive power, applied the rule of primary jurisdiction and refused to enjoin certain steamship lines from charging two different rates for one type of transportation service, while in the instant case the district court refused to apply the rule of primary jurisdiction and enjoined appellant from performing two types of transportation service for one and the same rate. This Court's decisions in those cases clearly required the district court to remand the instant case to the Commission.

The Motion to Affirm, at pp. 14-15, argues that the rule of primary jurisdiction is not applicable here because the Commission has "clarified" its views concerning "intentional delays of shipment to suit a shipper's needs." While the cases cited in support of that contention contain general language which, in its context, indicated that the Commission is generally against such delays because they are not in the public interest or contribute to car shortages, none of the cases involved investigations, hearings, adjudications or determinations by the Commission of the administrative questions squarely presented and calling for decision by the Commission in this case. Certainly none of the cited cases constitutes a decision or a clarification of the question whether, for its own competitive needs as well as shippers' needs, a railroad's performance of two types of service for one published tariff rate, open to all shippers at their election, violates any provision of the Interstate Commerce Act or Elkins Act, or whether the published tariff rate

is a reasonable rate for both fast and slow service, or results in unlawful advanages or discriminations.

CONCLUSION

We submit that the questions presented by the appeal are substantial and of great importance in the interpretation and administration of the Interstate Commerce Act and the Elkins Act and to railroads and shippers generally.

Respectfully submitted,

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July, 1959

PROOF OF SERVICE

I, ELMER B. COLLINS, counsel of record for appellant, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 28th day of July, 1959, I served copies of the foregoing Brief Opposing Motion to Affirm on the adverse party, as follows:

1. On the United States of America by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

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2. On the Interstate Commerce Commission by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

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Interstate Commerce Commission
Washington 25, D. C.

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No. 98

In the Supreme Court of the United States

OCTOBER TERM, 1959

UNION PACIFIC RAILROAD COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA, WESTERN DIVISION

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The findings of fact (R. 196–205), opinion (R. 205–219) and conclusions of law (R. 219–222) of the district court are reported at 173 F. Supp. 397.

JURISDICTION

The orders of the district court, granting the Government's motion for summary judgment (R. 223) and granting an injunction (R. 224), were entered on April 3, 1959. Notice of appeal was filed in the district court on April 10, 1959 (R. 231–233). Probable jurisdiction was noted on October 12, 1959 (361 U.S. 807). The jurisdiction of this Court is invoked under 49 U.S.C. 45.

QUESTIONS PRESENTED

1. Whether the intentional delaying by a carrier of a shipment in order to afford the shipper additional time to find a buyer constitutes the furnishing of privileges or facilities not authorized by the tariff, the transporting of property at less than the filed rate, or the giving of a concession to the advantage of a shipper, in violation of the Interstate Commerce Act or the Elkins Act.

2. Whether an injunction under § 3 of the Elkins Act (49 U.S.C. 43) in an action brought by the United States, at the request of the Interstate Commerce Commission, ordering a carrier to cease offering a delayed delivery service not specified in its filed tariff unless and until a new tariff specifying such service has been filed with the Commission and become effective, invades the primary jurisdiction of the Commission.

STATUTES INVOLVED

The pertinent parts of Section 6(1) and Section 6(7) of the Interstate Commerce Act (24 Stat. 380, as amended, 49 U.S.C. 6(1), 6(7)) and of Sections 1 and 3 of the Elkins Act (32 Stat. 847, 848, as amended, 49 U.S.C. 41, 43) are set forth in the Appendix, *infra*, pp. 39–42.

STATEMENT

At the request of the Interstate Commerce Commission, the United States commenced this action seeking an injunction to restrain the Union Pacific Railroad from violating § 6(7) of the Interstate Commerce Act (App. *infra*, pp. 39–40) and § 1 of the Elkins Act (App. *infra*, p. 40). The suit is grounded on

the admitted practice of the Railroad of intentionally delaying in transit, for the convenience of the shipper, the transportation of lumber between Ogden, Utah, and Council Bluffs, Iowa. Based upon the complaint (R. 1–7), answer (R. 7–19), and on cross motions for summary judgment with supporting affidavits and exhibits (R. 19–162), the district court found the facts to be as follows (R. 196–205):

1. ROLLER LUMBER TRAFFIC

In order to produce the vast quantity of lumber required during World War II, numerous new lumber mills commenced operation in the northwest area of the United States. To remain in business when the war demand ended, it was necessary for these mills to develop a method of merchandising adaptable to their operations and the so-called "roller" method of selling lumber resulted. In this type of marketing, a negotiable instrument covering a lumber shipment is turned over to wholesalers or brokers who endeavor to locate a purchaser while the shipment is moving eastward. When a sale is consummated, the transfer to the buyer is accomplished through diversion or reconsignment instructions to the railroad while the shipment is en route (R. 197–198).

Most roller lumber moves to markets east of the Missouri and Mississippi Rivers over lines and routes of railroads which directly serve the northwest area and which, with connecting lines, form numerous through routes to the various markets (R. 198). The Union Pacific has the shortest physical route to these markets and, under normal conditions, is able to deliver lumber in the shortest time (R. 198). Compet-

ing railroads with longer physical routes require a longer time in proportion to the number of miles the shipment must travel to reach its destination (R. 198). The cost of a shipment of lumber to an Eastern market, under published and approved tariff rates, is the same to the shipper whether the lumber is shipped by a direct route or by a long circuitous route (R. 198).

Following World War II, lumber shippers increasingly shipped by the longer circuitous routes in order to gain additional time in which to find a market for lumber which was in transit. For example, a shipment from Portland, Oregon, to Chicago via the Southern Pacific would travel 325 miles more than a shipment via Union Pacific's direct route (R. 198). If the same shipment was originated by Southern Pacific and routed through Tucumcari, New Mexico, and thence to Chicago, it would travel 1,090 miles more than by direct Union Pacific route (R. 198). Since a freight train travels on the average about 300 miles a day (R. 199), a shipper, in the situations illustrated by these examples, would gain from one to four days time in transit by utilizing a route other than Union Pacific's direct route.

2. UNION PACIFIC'S INTENTIONALLY DELAYED SERVICE

To meet the competition of the longer and more time-consuming routes and in order to attract lumber traffic to its lines, the Union Pacific offers to transit wholesalers of lumber a special service whereby it intentionally delays shipments of lumber in transit on its lines in order that the wholesaler may have additional time to find a market for his product (R. 199). As a further part of this special service,

when a sale of the shipment is made and wholesalers by a diversion order request prompt delivery, Union Pacific will remove a "transit car of lumber" from the delayed service and move it forward in regular service to its destination (R. 199). From September 21, 1949, to July 31, 1950, the delay in transit was accomplished by so-called "SMX" ("slow manifest service") schedules for the movement of freight (R. 199–200). "SMX" service between Ogden, Utah, and Council Bluffs, Iowa, was nine days as compared to a normal time of two to four days (R. 200). The delay was effected by setting loaded cars out at various sidings along the main line and restoring the cars to normal service whenever the shipper found a sale (R. 199). The "SMX" service was voluntarily suspended effective July 31, 1950, because of an acute car shortage and in an effort to assist in obtaining greater utilization of the car supply (R. 200).

Between July 31, 1950, and October, 1951, lumber shippers increasingly routed their traffic via longer and slower routes (R. 200). In an effort to regain such traffic, Union Pacific modified its practice by handling roller traffic over a parallel line of its railroad via Ellis, Kansas, 317 miles out of the direct line haul between Ogden and Council Bluffs. Under this procedure, the transit lumber shipper desirous of delayed service had only to place the code words "route via Ellis" on the bill of lading and shipping order (R. 200). This routing required two days over normal schedule when interchanged to connecting carriers at Kansas City, or three days over

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normal schedule when interchanged to connecting carriers at Council Bluffs (R. 200). In the interest of economy, the actual physical handling of traffic via Ellis was discontinued on December 12, 1953, and a so-called "lumber special" service was inaugurated. By this service a lumber shipper continued to use the code words "route via Ellis" and his shipment then proceeded on the Union Pacific main line, but on a schedule comparable to that obtained by a physical movement via Ellis (R. 200–201).

On January 6, 1954, the "lumber special" schedule between Ogden and Council Bluffs was changed to twelve days and on February 15, 1954, it was changed to fourteen days (R. 201). The delay was accomplished by setting lumber cars out on sidings between the point of origin and the point of destination (R. 201). Except for approximately the six month period from June 13 to December 7, 1956, when I.C.C. Service Order No. 910 prohibited the intentional delay of freight shipments while in transit, the Union Pacific continued to operate a 14-day delayed lumber service and "is likely to continue such practices if it is not restrained" (R. 201, 203).[1]

3. THE DECISION OF THE DISTRICT COURT

(a) On April 3, 1959, the district court granted the Government's motion for summary judgment (R. 223) and enjoined (R. 224–225) the Railroad from offering, granting, and giving delayed lumber freight service and from extending to any shipper privileges or facili-

[1] On December 7, 1956, the code words indicating that a shipper desired slow service were changed from "route via Ellis" to "via Colby [Kansas]" (R. 201).

ties of delay unless and until there is a tariff lawfully on file with the Commission naming the rates and charges for such privileges and facilities.[2] The intentionally delayed service, the court found, allows certain lumber shippers a service not provided for by the Railroad's tariff (R. 201). The court also found that by its delayed service Union Pacific contributes the use of its trackage and cars to provide a storage facility for transit lumber shippers and wholesalers, thereby assuming warehousing and inventory maintenance costs of a segment of the lumber industry at no expense to the lumber dealer (R. 201). This service, the court concluded (R. 220), violated § 6(7) of the Interstate Commerce Act prohibiting carriers from extending "to any shipper * * * any privileges or facilities in the transportation of * * * property, except such as are specified" in tariffs filed under § 6(1) of the Act.

In addition, the court found that the delayed lumber service results in added carrier operational problems and costs occasioned by the additional need for power and working crews (R. 202); and that the service entails the payment of excessive per diem costs for the use of foreign cars on the Railroad's line with the resulting tendency to unbalance Union Pacific's annual per diem offsets with other railroads to the economic disfavor of Union Pacific and to the detriment of the national policy to maintain economically stable transportation facilities (R. 202). Finally, the court

[2] The injunction was to become effective on April 23, 1959 (R. 227–228). By subsequent orders the injunction has been stayed pending a final determination of this appeal.

found that the delaying service for lumber is a device whereby transit lumber dealers avoid the payment of demurrage and obtain the advantage of having their lumber on wheels ready for diversion to any potential market and that these advantages place transit lumber dealers in a superior competitive position in the marketing of lumber (R. 202). The court concluded that the delayed lumber service constitutes a device whereby shippers are enabled to transport freight at less than published rates on file with the Commission, and whereby lumber shippers are given advantages, and discriminations are practiced, in favor of such shippers (R. 220). The service, therefore, was held to be a violation of § 1 of the Elkins Act, declaring unlawful the offer, grant or giving of "any rebate, concession or discrimination * * * whereby * * * property shall by any device whatever be transported at a less rate than that named in the tariffs * * * or whereby any other advantage is given or discrimination is practiced."

(b) In October, 1958, six railroad carriers other than Union Pacific filed with the Interstate Commerce Commission tariff schedules setting forth new rules, regulations and practices affecting rates and charges to become effective November 2, 1958 (R. 165). By these schedules, the carriers (R. 169–190) proposed to hold cars loaded with lumber for a period of fifteen days free of demurrage charges at nineteen points in western trunkline territory. On October 27, 1958, the Commission in Investigation and Suspension Docket No. 7050, *Lumber—Free Time Allowance at Hold*

Points, suspended these schedules until June 1, 1959, pending an investigation of their reasonableness (R. 166–167). Although the Union Pacific did not file a similar tariff, on December 15, 1958, in an amendment to its answer in the present case (R. 193), it was urged that the "'lawfulness' of the performance of a slow or delayed service for lumber shippers involves questions within the exclusive primary administrative jurisdiction of the Commission and having asserted that jurisdiction, the Commission has superseded the jurisdiction of this Court and created a situation which renders futile and useless further proceedings * * * and calls for dismissal of the complaint herein" (R. 193–194). In its opinion (R. 205–219), the district court rejected this contention. Noting that the Commission had administratively decided that the delayed lumber service is in violation of § 6(7) of the Interstate Commerce Act and § 1 of the Elkins Act and had requested the Attorney General to institute this proceeding, the court held that § 3 of the Elkins Act placed upon the court the duty of inquiry and decision and empowered the court "upon being satisfied of the truth" (49 U.S.C. 43) to enforce its decision by proper order (R. 210). In enjoining the Railroad from continuing its unlawful service, the court made it clear that it was not passing upon the reasonableness of the 14-day delay in service. "What this Court is holding is that any intentional delay in service offered by defendant must be published in tariff form, so that the Interstate Commerce Commission can

then determine if such delay is reasonable or unreasonable under the circumstances" (R. 219).[3]

SUMMARY OF ARGUMENT

I

A. Appellant's intentionally delayed lumber service, for the shippers' convenience, violates § 6(1) and § 6(7) of the Interstate Commerce Act. Section 6(1) requires that appellant file with the Interstate Commerce Commission, and publish, a tariff which, *inter alia,* must state any "privileges or facilities granted or allowed" by the carrier; § 6(7) prohibits a carrier from extending to "any shipper" privileges or facilities not specified in the carrier's tariffs. Appellant extends to transit lumber dealers a 14-day delayed freight service between Ogden, Utah, and Council Bluffs, Iowa—a distance of 993 miles which, proceeding with "reasonable dispatch," appellant's freight trains ordinarily cover in two to four days. The intentional delay in shipments of lumber is effected for the transit lumber dealer's accommodation—to provide additional time for the dealer to find a buyer for the commodity while in transit. During the intentionally delayed period, the freight car serves as a place of storage and constitutes "a privilege or facility" granted to certain shippers without tariff

[3] On July 31, 1959, a division of the Commission found that the proposed schedules of the carriers involved in Investigation and Suspension Docket No. 7050, were not shown to be just and reasonable and ordered that the schedules be canceled (App., *infra*, pp. 42–53). By order dated December 21, 1959, the Commission granted petitions for reopening the proceeding and reconsideration on the existing record (App., *infra*, pp. 53–54).

specification. The intentionally delayed service is, moreover, a service in excess of a carrier's implied obligation to deliver a shipment within a reasonable time and a deviation from the obligation expressed in the uniform bill of lading to which such shipments are subject. It is immaterial that appellant's delayed service is nominally available to all shippers as § 6(7) prohibits extending the service to any shipper without tariff specification.

B. From the fact that the appellant's intentionally delayed service violates § 6(7) it necessarily follows that the service is violative of § 1 of the Elkins Act which makes unlawful "any rebate, concession, or discrimination" whereby property is transported at less than tariff rates. By its delayed service, appellant assumes warehousing and inventory costs of a segment of the lumber industry; by unnecessarily setting cars on sidings to effect the 14-day delay, appellant incurs the expense attributable to the need for additional power and working crews; in addition, appellant incurs excessive *per diem* costs for the use of foreign cars on its lines. By absorbing these costs and expenses, appellant effects a *pro tanto* reduction in its receipts for the transportation service itself, which amounts to a rebate to the shipper due to "concessions" afforded particular shippers and "discriminations" in favor of shippers in a position to utilize the service. The intentionally delayed service is thus a plain violation of the Act.

The concessions and discriminations inherent in appellant's delayed service result in obvious "advantages" to certain shippers which also make the service

unlawful under § 1 of the Elkins Act. The only reason for the intentionally delayed service is to avoid observance and compliance with appellant's demurrage tariff. In this light, the service is a device to confer an "advantage" upon particular shippers. The advantage is not only pecuniary, but is economic in the sense that a segment of the lumber industry obtains a superior competitive position by appellant gratuitously furnishing a "rolling warehouse."

Decisions of this Court and other courts fully confirm that the district court here correctly concluded that appellant's intentionally delayed service, without tariff provision and for the shipper's convenience, violates both § 6(7) of the Interstate Commerce Act and § 1 of the Elkins Act.

II

A. Appellant's argument that this proceeding, under § 3 of the Elkins Act, presents issues within the primary jurisdiction of the Interstate Commerce Commission is without merit. Section 3, authorizing this proceeding, was enacted to strengthen the enforcement arm of the Commission. This suit for an injunction was commenced at the request of the Commission; under § 3 of the Elkins Act, the district court had the duty to inquire, and, upon being satisfied that the delayed service violates the law, it was obliged to direct its discontinuance. The court has gone no further than the jurisdictional statute provides. The fact that six carriers other than appellant, after the commencement of this suit, filed tariffs whereby they would offer a 15-day delayed lumber service without demurrage charge serves to buttress our position that appellant's service, without tariff provision, is outside

the law. The proceeding now pending in the Commission, to determine the reasonableness and justness of the proposed lumber tariffs filed by other carriers, involves no issue essential or relevant to a final disposition of this suit.

B. Primary jurisdiction concepts have no application here for the further reason that the Commission has already considered the facts relating to appellant's practice and has, in effect, invoked the aid of the court to compel appellant to comply with the applicable statutes and to observe existing tariffs. By taking jurisdiction, the district court actually acts in aid of the primary jurisdiction of the Commission since the injunction here is effective only "unless and until" appellant files with the Commission a tariff providing for an exception to its demurrage tariff or specifying the privileges and facilities it now offers without tariff provision.

C. Independent of the pending proceeding before the Commission, there is no basis for applying the principle of primary jurisdiction to this case. The suit is one to enjoin statutory violations and, in effect, to compel the carrier to observe its existing demurrage tariff. Such suits have always been recognized as being within the judicial province without the need for referral to or of further aid from the Commission. The operative facts of appellant's unlawful practice are admitted and have been previously before the Commission. The expertise or specialized competence of the Commission is in no way essential to a determination of the legality of the practice which is all that the district court has decided. Nor are considerations

of uniformity valid as a predicate for applying the doctrine of primary jurisdiction here. There is no possibility of divergent decisions by various district courts, and an affirming decision by this Court will materially advance the Commission's objective of bringing all carriers within the law and assure equality of treatment for all shippers by all carriers.

ARGUMENT

I. APPELLANT'S INTENTIONALLY DELAYED LUMBER SERVICE, FOR THE CONVENIENCE OF SHIPPERS, VIOLATES THE INTERSTATE COMMERCE ACT AND THE ELKINS ACT

A. BY INTENTIONALLY DELAYING LUMBER SHIPMENTS, APPELLANT EXTENDS TO THE SHIPPER "PRIVILEGES OR FACILITIES" NOT SPECIFIED IN ITS TARIFFS

By § 6(1) of the Interstate Commerce Act (App. *infra,* p. 39) every common carrier is required to file with the Interstate Commerce Commission, and to print and keep open to public inspection, schedules showing all the rates, fares and charges for transportation. The schedules "shall plainly state the places between which property * * * will be carried * * * [and] all privileges or facilities granted or allowed * * *" (49 U.S.C. 6(1)). By § 6(7) of the Act (App. *infra,* pp. 39–40), a carrier is prohibited from extending "to any shipper * * * any privileges or facilities in the transportation of * * * property, except such as are specified in such tariffs" (49 U.S.C. 6(7)). Appellant's intentionally delayed lumber service is within this statutory proscription.

Under normal conditions, appellant's freight trains travel the 993 miles between Ogden, Utah, and Council Bluffs, Iowa (R. 96), in two to four days (R.

199). By the device of a shipper's placing code words—"route via Ellis" (R. 200) or "via Colby" (R. 201)—on the bill of lading and shipping orders, the travel time for this distance is extended by appellant to fourteen days for no other reason than to accommodate the shipper and thereby attract lumber traffic to appellant's line. During the unnecessarily extended transit period, appellant contributes the use of its trackage and cars to provide a warehouse on wheels for transit lumber shippers and wholesalers while they search the markets for buyers for their lumber (R. 201). "To permit a shipper * * * to use freight cars [as a place for storage] is obviously beyond the duties of a carrier",[4] and is an obvious extension to shippers of both "privileges" and "facilities" for which no provision is made in appellant's published tariffs.

Appellant's argument (Br., pp. 46–50), to the effect that its 14-day delayed service between Ogden and Council Bluffs simply reflects an "operating time schedule" slower than the usual two-to-four day service between these points, can hardly be squared with the facts. The record confirms that appellant's delayed service is tailored to fit the economic needs of a particular segment of the lumber industry—the small lumber mills in the northwest. To remain in business at the end of World War II, it was necessary for these mills to develop a method of merchandising adaptable to their operations (R. 197). The "roller"

[4] *Turner, Dennis & Lowry Lumber Co.* v. *Chicago, M. & St. P. Ry. Co.*, 271 U.S. 259, 262; *Chicago & Alton R. Co.* v. *Kirby*, 225 U.S. 155, 164.

method of marketing resulted (R. 197). By this method, "[t]he rolling railroad car is the warehouse" (R. 32, 205); the mill operator "runs his logs through the mill, loads up a car with a favorable mixture, calls the tally to his wholesale outlet and sends them his bill of lading" (R. 31). The appellant then intentionally delays the shipment to afford the lumber wholesaler additional time to find a market for the rolling lumber (R. 2, 8); and, as a further service, when the transit wholesaler (by means of a diversion order) requests prompt delivery of a shipment, the carrier removes the "transit car of lumber" and moves it forward in the regular service toward destination (R. 2, 8; 42–43). Clearly, this type of service is in excess of the carrier's implied obligation "to carry safely and deliver at destination within a reasonable time"[5] and a variation from the terms of § 2(a) of the "Contract Terms and Conditions" of the uniform bill of lading to which appellant's "roller" lumber shipments are subject. Section 2(a) provides that "no carrier is bound to transport * * * property by any particular train * * *, or in time for any particular market or otherwise than with reasonable dispatch" (R. 109).

[5] *Chicago and Alton Railroad Company* v. *Kirby*, 225 U.S. 155, 164; *Davis* v. *Cornwell*, 264 U.S. 560. This Court stated in *Turner Lumber Co.* v. *Chicago, M. & St. P. Ry. Co.*, 271 U.S. 259, 262: "* * * Another cause is diversion of the car from its primary use as an instrument of transportation by employing it as a place of storage, either at destination or at reconsignment points, for a long period while seeking a market for the goods stored therein. To permit a shipper so to use freight cars is obviously beyond the ordinary duties of a carrier. * * *"

The delayed service for the shipper's convenience is a violation of § 6(7) even though appellant makes such service available to all shippers desiring such service (R. 203; cf. R. 35–40). The violation, in terms of § 6(7), is, of course, the extension to shippers of privileges and facilities not specified in appellant's tariffs. Absent the requisite tariff-filing and publication, shippers, insofar as the record discloses, "are familiar with the operation * * * [only] by word of mouth" of appellant's traffic representatives (R. 41). And, to quote further from appellant's general manager (R. 41):

> * * * [V]ery little information pertaining to operation has been released in writing both by the Traffic and this department. * * * it is questionable as to how well it is advertised based on the fact that General Superintendent of Transportation Mahoney, of Santa Fe, just called me day before yesterday, * * * and advised that a representative of a large lumber industry on West Coast had called him on the phone advising him of the handling of this lumber on several other routes including Union Pacific and that unless Santa Fe could likewise handle this traffic they were being cut out of the routing. Mr. Mahoney stated he advised this representative that he could not believe other lines were so handling equipment, especially during the present car situation, and that he would certainly be afraid of ICC taking similar action as previously in the matter.

If, as appears, the General Superintendent of Transportation of a competing carrier was, in July 1954, unaware of appellant's delayed service to transit lum-

ber dealers, the shipping public is probably not in a better position to know that appellant offers, on request or by use of code words on shipping documents, the special service of a 14-day gratuitous delay in transit, whereby the shipper may avoid the demurrage tariffs normally applicable where a freight car is detained by a shipper, consignee, or owner.

A published tariff, conforming to the requirements of § 6(1) of the Act, constitutes notice to all not only of the carrier's rates, but of all "privileges and facilities granted or allowed" by the carrier. And the purpose of requiring a tariff is:

> * * * to secure uniformity of treatment to all, to suppress unjust discriminations and undue preferences, and to prevent special and secret agreements * * * and to that end to require that such rates be established in a manner calculated to give them publicity, to make them inflexible while in force, and to cause them to be unalterable save in the mode prescribed. * * * [*Kansas City So. Ry.* v. *Albers Comm. Co.*, 223 U.S. 573, 597].

It would be an obvious subversion of this Congressional purpose to countenance the giving of special privileges and facilities to shippers because the carrier does not deny the service to any shipper desiring it, and, in extending the service to transit lumber dealers in particular, appellant has not acted selectively or secretly (R. 203). The tariff requirement in § 6(1) is designed to eliminate secret agreements and selective treatment of shippers by the carrier. Implementing § 6(1), § 6(7) prohibits any deviation from established tariffs and prohibits the practice of

extending to shippers "privileges or facilities" not specified in appellant's tariffs.

B. THE DELAYED LUMBER SERVICE IS A DEVICE WHEREBY PROPERTY IS TRANSPORTED AT LESS THAN TARIFF RATES AND IS AN ADVANTAGE GIVEN SHIPPERS USING SUCH SERVICE

1. "[A] preference or rebate is the necessary result of every violation of § 6(7) where the carrier renders or pays for a service not covered by the prescribed tariffs." *United States* v. *Wabash R. Co.*, 321 U.S. 403, 412–413; accord, *United States* v. *U.S. Smelting Co.*, 339 U.S. 186, 194–195; *Davis* v. *Cornwell*, 264 U.S. 560, 562. From the fact that appellant makes available privileges and facilities not provided by tariff (*supra*, pp. 14–19), it follows that the delayed lumber service it renders is also a violation of § 1 of the Elkins Act (App. *infra*, p. 40), declaring unlawful "any rebate, concession, or discrimination in respect to the transportation of any property * * * by any common carrier * * * whereby * * * property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by [the] carrier * * *" (49 U.S.C. 41(1)).

It is admitted that appellant renders a special, delayed service (R. 8–18); it is also admitted that appellant's tariffs do not provide for such service and that no additional charge is exacted of the shipper in a position to take advantage of this service (R. 4, 17). The district court found (and it is not questioned) that, in providing the service, appellant assumes warehousing and inventory maintenance costs of a segment of the lumber industry (R. 201); and that, in unnecessarily setting cars out on sidings to

accomplish the 14-day delay, operational problems arise and costs to the carrier are added, occasioned by the additional need for power and working crews (R. 202). In addition, the delayed service entails the payment of excessive *per diem* costs for the use of foreign cars on appellant's lines to the economic disfavor of appellant (R. 202).[6] Since the additional costs for the delayed lumber service, not specified in appellant's tariff, are assumed by the carrier, there is necessarily a *pro tanto* reduction in appellant's receipts for the transportation service performed. The reduction in receipts here occurs because appellant grants a concession, with the effect of a rebate, to transit lumber shippers and dealers as against shippers who have no need for the special service but must, nevertheless, pay the full tariff rate for transportation.

This court has said, "* * * [A] saving [to a shipper] on the nontransportation services obviously

[6] Excessive per diem costs attributable to the 14-day delayed service were, in July 1954, a source of internal concern to appellant (R. 41):

"In addition to the complications being experienced by the Operating Department, I mention the unfavorable per diem situation. For example, yesterday July 8th there were en route 19 lumber trains on the Eastern District, total of 1,716 cars of which 1,600 were foreign line.

"Based on per diem pay-out of $2.40 per car this amounts to $3,840.00 per day, and based on 14 days schedule requested by Traffic Department Ogden to Council Bluffs the per diem amounts to approximately $53,760.00, there being a slight reduction due to a few cars being diverted and expedited from intermediate terminals. This compares with $26,880.00 when this traffic was moving on previous seven day schedule. For a thirty day period this certainly reflects adversely on Car Hire statement."

figures out the same as a rebate on the transportation service. * * * The [carriers'] loss on in-transit warehousing, entered into to secure the rail-haul, results in lowered receipts for the transportation and in violation of the section [§ 6(7), forbidding the receipt of a less compensation than the tariff]. Some shippers are not in a position to avail themselves of the below-cost in-transit service. They must pay the full transportation rate, without any offset from the warehousing. This discrimination between shippers is unlawful and the remedy applied by the [Commission's] order valid in these circumstances." *Baltimore & Ohio R. Co.* v. *United States,* 305 U.S. 507, 523, 526. See, also, *United States* v. *Union Stock Yard & Transit Co.,* 226 U.S. 286.

2. The concession appellant accords transit lumber shippers, and the discrimination practiced in their favor, also confer upon such shippers, and others in a position to make use of the delayed service, "advantages" prohibited by § 1 of the Elkins Act. The most obvious advantage inuring to the shipper or owner of the shipment by appellant's device of setting cars out on sidings while a shipment is in transit is that the carrier fails "strictly to observe" (49 U.S.C. 41) its demurrage tariff, and the shipper avoids the payment of demurrage charges specified in appellant's demurrage tariff (R. 73–85) which applies "[w]hen cars are held in transit because of any condition solely attributable to consignor, consignee or owner" (R. 79).[7] This tariff authorizes twenty-four hours

[7] See, in particular, Rule 1A (R. 77); Rule 2B, pars. 1 and 4 (R. 79); Rule 3B, pars. 1 and 2 (R. 80); Rule 4B (R. 82); Rule 7A (R. 85).

free time (exclusive of holidays and weekends) when cars are held for reconsignment, diversion, reshipment, or held in transit (at a designated point) on orders of the consignor, consignee or owner (R. 79); after the expiration of the free time allowance, demurrage charges at the rate of $4.00 for the first four days, and $8.00 for each subsequent day, become applicable (R. 85). Thus, a car of transit lumber moving from Ogden to Council Bluffs "with reasonable dispatch" (R.109) ("two to four days" (R. 199)), but not diverted or reconsigned for want of a buyer within twenty-four hours, would thereafter be subject to demurrage charges that, for a ten day delay, would amount to $64.00, computed on the basis of three days in transit and one free day at the point of consignment.

Appellant's intentional delaying of the shipment en route, while the owner looks for a buyer, permits the transit lumber dealer to avoid such charges—an apparent pecuniary advantage, and, *vis a vis* lumber dealers who do business on a firm order basis, gives to the transit dealer a superior competitive position in the marketing of lumber (R. 202). With appellant providing gratuitously a "rolling warehouse," the transit dealer "is always on the current market * * *, his lumber is bringing him a premium price * * * because the buyer is willing to pay more for lumber rolling and only a few days from being at destination, which eliminates the necessity of consumers maintaining large inventories" (R. 31–32).

3. The unlawfulness of appellant's delayed lumber service, in terms of § 1 of the Elkins Act, is as clear

as it is in terms of § 6(7) of the Interstate Commerce Act (*supra*, pp. 14–19). Property is, in effect, transported at less than tariff rates and advantages are given to shippers who know of, and are in a position to take advantage of, the special service; and, by intentionally delaying shipments en route, shippers escape the demurrage charge and appellant avoids observance of and compliance with its own demurrage tariff.

That appellant's practices are violations of the statute is fully confirmed by judicial decisions. In *Baltimore & Ohio R. Co.* v. *United States*, 305 U.S. 507, 526, this Court held that a nontransportation service provided by the railroad—in transit warehousing—at less than compensatory rates, was a violation of § 6(7) forbidding the railroad from receiving less compensation than provided by the transportation tariff. In *Chicago & Alton R. Co.* v. *Kirby*, 225 U.S. 155, the Court held that a carrier's agreement to expedite a shipment was illegal where the carrier's tariff made no provision for the service.

> An advantage accorded by special agreement *which affects the value of the services to the shipper and its cost to the carrier* should be published in the tariffs, and for a breach of such a contract, relief will be denied, because its allowance without such publication is a violation of the [Elkins] Act. It is also illegal because it is an undue advantage in that it is not one open to all others in the same situation. [225 U.S. at 165; emphasis added.] *

* See also, *Davis* v. *Cornwell*, 264 U.S. 560; *Siebert* v. *Erie Railroad Co.*, 189 App. Div. 586, affirmed, 232 N.Y. 517, holding

In *Eastern Shore* v. *New York, P. & N.R. Co.*, 141 Va. 611, 126 S.E. 674, the court held it unlawful, under § 1 of the Elkins Act, for a carrier to delay intentionally the arrival of shipments to give the shipper the advantage of a better market price.[9] Similarly, in *Louisville & N.R. Co.* v. *Warren County Strawberry Growers Association*, 206 Ky. 482, 267 S.W. 551, the court held illegal a carrier's agreement to deliver a commodity within a specified time. The court said (206 Ky. at 485–486):

> * * * [a] carrier contracting to deliver a commodity within a specified time extends to the shipper an advantage and imposes upon itself an obligation not contemplated in the usual method of shipment. If in the tariffs of a carrier on file with the Interstate Commerce Commission there is no provision fixing the schedule of time for delivery of commodities shipped under those tariffs and if for that reason the carrier may contract with whomsoever it chooses to deliver within a specified time and decline to

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unlawful, and not binding on the carrier, an agreement to temporarily leave a car on a siding en route solely for the shipper's accommodation.

[9] *Eastern Shore* v. *New York, P. & N.R. Co.*, 141 Va. 611, 616: "No special rate has been shown to have been published for special contracts to delay shipments, and hence no shipments could legally be delayed.

"If it is unlawful to contract to expedite a shipment, it is unlawful to contract to delay it * * *. These cabbages were not diverted to another market, but the device adopted was one to delay their arrival in the market to which they were originally billed.

"The possibility of discrimination between shippers, to delay one shipper's goods and to forward another's, is as great in this case as it is in case of a special contract to expedite. It is clearly unlawful and custom could not make it lawful."

> so contract with others with whom it may not desire to do so, the entire scheme of prevention of discrimination by carriers devised by the Federal Congress would be rendered of no value. Such shipments with delivery so contracted for would universally be given every service preference at the hands of the carrier. Such preference would be discrimination of the most pernicious character. * * * [To institute such a service] it is indispensably necessary that such be published as a part of the tariffs, and be filed with the Interstate Commerce Commission. Then such service would be open to the shipping public at large on equal terms.

On the basis of these authorities, with the relevant facts pertaining to appellant's intentionally delayed service admitted (R. 7–18), the district court concluded that the delayed service for the convenience of the shipper was a plain violation of both § 6(7) of the Interstate Commerce Act and § 1 of the Elkins Act (R. 219–221). The court's conclusions are undoubtedly correct.[10]

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[10] Though the point is not emphasized in this Court, the district court was clearly correct in rejecting (R. 221) appellant's defense based upon "competitive necessity." The assertion (Br. 8, 11–12, 53; R. 8–15, 199, 200) that appellant is compelled to resort to a delayed lumber service in order to compete with carriers having longer and more circuitous routes (R. 8–15, 199, 200) simply serves to confirm the obvious—that appellant offers, without tariff provision, privileges and facilities, concessions and advantages to particular shippers in order to divert traffic to its lines. Competitive necessity, even in its most exaggerated form, cannot justify practices so obviously in violation of law. *Baltimore & Ohio R. Co.* v. *United States*, 305 U.S. 507, 523; *Chicago, St. P., M. & O. Ry. Co.* v. *United States*, 162 Fed. 835, 839 (C.A. 8), certiorari denied, 212 U.S. 579; *Wisconsin Central Ry. Co.* v. *United*

II. THE DISTRICT COURT DID NOT INVADE THE "PRIMARY JURISDICTION" OF THE INTERSTATE COMMERCE COMMISSION

Appellant's answer to the Government's complaint for an injunction, as originally filed (R. 7–19), admitted the jurisdiction of the district court (R. 8) and did not suggest that the complaint raised fact questions within the primary jurisdiction of the Interstate Commerce Commission. Following appellant's answer, in October, 1958, six carriers, other than appellant, filed with the Commission tariff schedules offering to effect a 15-day delay in the movement of cars of lumber by holding them at various "hold points" without demurrage charges (R. 169–190, 204). On October 27, 1958, the Commission suspended these tariffs and instituted an investigation of the lawfulness of the schedules—"it * * * appearing, [t]hat * * * there is reason to believe that * * * if permitted to become effective, [the schedules] would [result] in rules, regulations or practices which would be unjust and unreasonable in violation of the Interstate Commerce Act * * *" (R. 166).

States, 169 Fed. 76 (C.A. 8); *Turner, Dennis & Lowry Lumber Co.* v. *Chicago, M. & St. P. Ry. Co.*, 2 F. 2d 291, 296 (W.D. Mo.), affirmed, 271 U.S. 259. "We suppose the main reason which in times past moved railroad companies to make rebates or concessions in individual cases was to secure business for their lines, and that the spirit of competition in the race for business brought about the practice of so granting rebates and concessions. This practice, we understand, was the vice aimed at in recent legislation which has for its main object the equalization of rates between given points for the same service * * *". *Chicago, St. P., M. & O. Ry. Co.* v. *United States*, 162 Fed. 835, 839 (C.A. 8), certiorari denied, 212 U.S. 579.

On December 15, 1958, appellant amended its answer in this case (R. 193–194) on the basis of the proceedings pending before the Commission. Appellant urged that the "lawfulness" of a slow or delayed service for lumber shippers involves questions within the exclusive primary jurisdiction of the Commission and that, having asserted that jurisdiction, the Commission has "superseded" the jurisdiction of the district court and has created a situation which "renders futile and useless further proceedings" in this case; appellant therefore called for a dismissal of the Government's complaint (R. 193–194). This argument, rejected by the district court (R. 208–215), is renewed in this Court (Br. pp. 23–46). We submit that the point is without merit.[11]

A. THIS INJUNCTIVE PROCEEDING UNDER § 3 OF THE ELKINS ACT DOES NOT PRESENT ISSUES WITHIN THE PRIMARY JURISDICTION OF THE COMMISSION

1. "* * * The Elkins Act is a part of the federal statutory system for the regulation of interstate carriers of commerce. As with other portions of that system a chief purpose of its enactment was to eliminate rebates, concessions or discriminations from the handling of commerce, to the end that persons and places might carry on their activities on an equal basis. With the adoption of prohibition against open rate-cutting, various devices were resorted to * * *

[11] As previously noted, *supra*, p. 10, n. 3, on July 31, 1959, a division of the Commission found that the proposed schedules of the carriers involved in Investigation and Suspension Docket No. 7050 were not shown to be just and reasonable and ordered that the schedules be cancelled (App., *infra*, pp. 42–53). By order dated December 21, 1959, the Commission granted petitions for reopening the proceeding and reconsideration on the existing record (App., *infra*, pp. 53–54).

[and] concealment of the receipt or payment of rebates was made manifest. Strengthening of the enforcement provisions was sought. This effort finally culminated in the legislative authorization of the injunction as the simplest and most summary legal instrument to destroy discrimination. * * *'' *Union Pacific R. Co.* v. *United States,* 313 U.S. 450, 461.[12] This is such a suit.

As a result of extended investigation, the Commission had "reasonable ground for belief" that appellant and other common carriers were engaging in the carriage of freight at less than published rates and were committing discriminations forbidden by law. 49 U.S.C. 43. At the request of the Commission (R. 210), the United States, on December 23, 1957, commenced this suit (and simultaneously a like proceeding against the Northern Pacific Railway Co.) [13] seeking, as provided by § 3 of the Elkins Act, a discontinuance of the unlawful practice of intentionally delaying lumber shipments solely for the shipper's convenience. With the commencement of this suit, it was "the duty of the court summarily to inquire into the circumstances * * * and upon being satisfied of the truth of the allegations of said petition * * * [t]o enforce an observance of the published tariffs or direct and require a discontinuance of * * * discrimination * * *'' (49 U.S.C. 43). See *Chicago, Ind. & L.*

[12] See, also, *Armour Packing Co.* v. *United States,* 209 U.S. 56, 72; *New York, N.H. & H.R.R. Co.* v. *Interstate Commerce Commission,* 200 U.S. 361, 391.

[13] *United States* v. *Northern Pacific Railway Co.,* Civil No. 3-57-164 (D. Minn.), being held in abeyance pending final disposition of this appeal.

Ry. Co. v. *United States*, 219 U.S. 486, 490–491. The injunction issued in this case (R. 224–225) goes no further than this statutory mandate; in no sense has the district court usurped or invaded the primary jurisdiction of the Commission. *Union Pac. R. Co.* v. *United States*, 313 U.S. 450; *United States* v. *Erie Railroad*, 236 U.S. 259; *Chicago, Ind. & L. Ry. Co.* v. *United States*, 219 U.S. 486, 490–491; *United States* v. *Boston & Maine Railroad*, 157 F. Supp. 218 (D. Mass.); cf. *International Longshoremen's Union* v. *Juneau Spruce Corp.*, 342 U.S. 237, 243–245.

Appellant's argument to the contrary comes as an apparent afterthought prompted by the fact that six other carriers, in apparent recognition of the law's requirements, filed tariffs whereby they, in effect, seek an exemption from existing demurrage tariffs by offering a 15-day delay to lumber shippers without charge—a service appellant now provides without tariff. This fact, however, only demonstrates the anomaly of appellant's position, for the effect of the injunction here is simply to require appellant to observe its demurrage tariff or to file a tariff, specifying the delayed service it now offers certain shippers. Since appellant has filed no tariff providing for its delayed service without charge, the problems here are markedly dissimilar from those involved in Investigation and Suspension Docket No. 7050, *Lumber—Free Time Allowance at Hold Points* (R. 165–166), where the Commission is considering the legality of intentional delay without demurrage charge but *with* tariff provision for the service. The issues in this case are whether appellant, under § 6(7) of the Com-

merce Act, provides "privileges or facilities" to shippers without tariff specification and whether, in doing so, appellant violates § 1 of the Elkins Act. The Commission, on the other hand, is concerned with the reasonableness and justness of tariff schedules filed in accordance with law.[14] The reasonableness or justness of appellant's practice was a matter with which the district court was not concerned and did not even remotely consider (R. 219).

Nothing, then, involved in the pending administrative proceeding is essential or even relevant to the determination of the issues in this suit. In this light, this case is within the rationale of *Crancer* v. *Lowden*, 315 U.S. 631. There, the carrier brought suit to recover certain freight charges; the shipper moved to stay the proceeding pending a determination by the Commission as to the reasonableness of the carrier's freight rate. The issue raised in the trial court was, however, one of classification, a matter upon which the Commission had already passed. The court of appeals sustained the jurisdiction of the trial court. This Court affirmed, saying: "The issue of the reasonableness of the rates was not open to the District Court. The meaning of the tariff had been determined by the Commission. It remained to the railroad only to collect the rates for which the tariff called and for the District Court only to see that the railroad did collect them. * * * Nothing involved in the pending administrative proceedings before the * * *

[14] The fact that a non-transportation service is provided for by tariff, does not, of course, necessarily mean that the service is lawful. *Baltimore & Ohio R. Co.* v. *United States*, 305 U.S. 507.

Commission was essential to the determination of the issue in this suit." 315 U.S. at 635–636.

2. Moreover, "[t]he doctrine of primary jurisdiction * * * is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties." *United States* v. *Western Pac. R. Co.,* 352 U.S. 59, 63. This suit was brought at the request of the Commission; the administrative agency concerned has, in effect, invoked the aid of the court in the precise manner contemplated by Congress in § 3 of the Elkins Act. In these circumstances, to dismiss the complaint and remand the case to the Commission, as appellant argues should be done (Br. 63), would hardly foster collaboration between court and agency and would be counter to the Congressional intent expressed in § 3 of the Act. Cf. *United States* v. *Ruzicka,* 329 U.S. 287, 294; *United States* v. *Morgan,* 313 U.S. 409, 422. It is the very purpose of § 3 to provide a summary method to enjoin practices not authorized by a filed tariff and to require the carrier to proceed before the Commission, by filing new tariffs, if it wishes to adopt practices not presently authorized in the tariffs. If, as appellant contends, the district court cannot decide whether a practice is one that must be authorized by a tariff or results in a rate less than the filed rate, the object of the section to provide a summary procedure for that purpose would be defeated.

To refer this case to the Commission would, in any event, be an idle formalism. The operative facts relevant to appellant's delaying practices stand admitted (R. 7–18); as to the legality of the practice under the

commerce laws, the Commission's views have already been made abundantly clear by the Commission's act of requesting the Attorney General to institute the proceeding.[15] As the Court aptly said in *United States* v. *Western Pac. R. Co.*, 352 U.S. 59, 69: "Certainly there would be no need to refer the matter of construction to the Commission if that body, in prior releases or opinions, has already construed the particular tariff or clarified the practices underlying it." See, also, *Crancer* v. *Lowden*, 315 U.S. 631.

In summary, by retaining jurisdiction and resolving the legal questions posed by the complaint and appellant's answer, the district court has not usurped or invaded the jurisdiction of the Commission; on the contrary, by enjoining the continuing violations of law, the court has acted in aid of the Commission's jurisdiction. The injunctive order here is effective "unless and until" there is in force with respect to appellant a tariff lawfully on file with the Commission specifying the privileges and facilities presently accorded to some shippers without tariff (R. 225). Thus, by following the lead of the six other carriers who have already filed special lumber tariffs, appellant may obtain from the Commission a determination

[15] This view by the Commission is wholly consistent with prior expressions and decisions by the Commission in which it has repeatedly condemned intentional delays in shipment to suit a shipper's needs. See, *e.g.*, *Chicago, M., St. P. & P.R. Co.* v. *Spokane, P. & S. Ry. Co.*, 300 I.C.C. 453, 487; *Railroad Operating Regulations for the Movement of Loaded Freight Cars*, 298 I.C.C. 371, 375; *Reconsignment Case*, 47 I.C.C. 590, 624; *Export Grain Storage Charges*, 42 I.C.C. 530, 543; *American Paper & Pulp Association* v. *B. & O. R.R. Co.*, 41 I.C.C. 506, 511–513.

of the reasonableness of its practice. Similarly, by filing a tariff, appellant will aid the Commission in "effectuating desirable uniformity and fair competitive relations among all railroads participating in the 'roller' lumber traffic" (App. Br. p. 46). And it is to the Commission, not the court, that appellant should take its plea (Br. pp. 9–11, 53) that the shortest physical route from west to the mid-west, which it has, somehow places it in an inferior competitive position with respect to other carriers. *Supra,* pp. 25–26, n. 10.

B. THERE IS NO BASIS FOR A REFERRAL OF THIS CASE BACK TO THE COMMISSION

We have shown above that the Commission, the administrative agency concerned, has in effect invoked the aid of the court in enforcing existing statutes and in enforcing the published demurrage tariff which has the force and effect of law;[16] that the subsequent administrative proceeding differs materially, both in its nature and in the issues under consideration, from this case; and that the order of the district court is in aid of, not an encroachment upon, the primary jurisdiction of the Commission. Aside from the pending Commission proceeding involving six carriers other than appellant, there is, moreover, no other basis for an application of the doctrine of primary jurisdiction to this case.

1. Since the enactment of the Elkins Act in 1903, the courts have entertained proceedings to enforce the commerce laws and published tariffs without any intimation that the court could not apply the law or

[16] *Penna. R.R. Co.* v. *International Coal Co.*, 230 U.S. 184, 196.

enjoin statutory or tariff violations without a referral to the Commission for preliminary fact determinations.[17] The reasons are apparent from the nature of the proceedings, brought, as they are, at the instance of the regulatory agency, and, presenting, as they do, questions pertaining to the enforcement of tariff provisions and of the commerce laws outlawing in the plainest terms specific conduct by carriers subject to those laws. It must now be taken as settled that such matters are properly decided by the courts whether the proceeding is criminal, civil, or, as this case, in equity, without the need for any reference to, or aid from, the Commission. *Union Pacific R. Co.* v. *United States,* 313 U.S. 450; *United States* v. *Union Stock Yard & Transit Co.,* 226 U.S. 286; *United States* v. *Mich. Portland Cement Co.,* 270 U.S. 521, 522, 524; *United States* v. *Erie Railroad,* 236 U.S. 259; *Chicago, Ind. & L. Ry. Co.* v. *United States,* 219 U.S. 486, 490–491; *United States* v. *Boston & Maine Railroad,* 157 F. Supp. 218 (D. Mass.); see, also, *Crancer* v. *Lowden,* 315 U.S. 631, 635–636; *Yonkers* v. *United States,* 320 U.S. 685, 689; *Texas & Pac. Ry.* v. *Gulf, etc., Ry.,* 270 U.S. 266, 273; *Penna. R.R. Co.* v. *International Coal Co.,* 230 U.S. 184, 196–197; *Mitchell Coal Co.* v. *Penna. R.R. Co.,* 230 U.S. 247, 266; *Turner Lumber Co.* v. *Chicago, M. & St. P. Ry. Co.,* 271 U.S. 259, 262; *Chicago & Alton Ry. Co.* v. *Kirby,* 225 U.S. 155, 164–165; cf. *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.,* 204 U.S. 426, 447–448; *Great Northern Ry. Co.* v. *Mer-*

[17] Compare *United States Navigation Co.* v. *Cunard S.S. Co.,* 284 U.S. 474; *Far East Conference* v. *United States,* 342 U.S. 570.

chants Elevator Co., 259 U.S. 285, 294; *United States* v. *Western Pac. R. Co.*, 352 U.S. 59.

2. (a) The principle of primary jurisdiction has no place here for the additional reason that the case requires no inquiry, factual or legal, into matters committed exclusively to administrative discretion or to matters requiring specialized administrative competence. *United States* v. *Western Pac. R. Co.*, 352 U.S. 59, 64. The operative facts relative to appellant's delayed lumber service are admitted. The presence of these factors, together with the fact that the Commission itself, through the Attorney General, has invoked the aid of the court, are sufficient to distinguish *United States Navigation Co.* v. *Cunard S.S. Co.*, 284 U.S. 474, and *Far East Conference* v. *United States*, 342 U.S. 570, upon which appellant relies.[18] Since the Commission has considered the facts pertaining to appellant's intentionally delayed lumber service and has referred the matter to the Department of Justice for action under § 3 of the Elkins Act, this case closely parallels *Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, where, after administrative consideration, the

[18] Since the Elkins Act was passed to strengthen the enforcement arm of the regulatory agency (*Union Pacific R. Co.* v. *United States*, 313 U.S. 461–462), it cannot validly be argued here that the remedies possibly open to the Commission under the Interstate Commerce Act are exclusive or supersede the judicial remedy provided for in § 3 of the Elkins Act. Compare the statutes involved in *United States Navigation Co.* v. *Cunard S.S. Co.*, 284 U.S. 480–481; *Far East Conference* v. *United States*, 342 U.S. 570; and see Jaffe, *Primary Jurisdiction Reconsidered*, 102 Pa. L. Rev. 577, 592–595; Convisser, *Primary Jurisdiction: The Rule and its Rationalizations*, 65 Yale L. J. 815.

Court passed upon the lawfulness of the dual-rate system under the Shipping Act of 1916. The district court has done no more than to pass upon the legality of appellant's service in the light of the operative facts which were previously before the Commission as a result of its investigation and which now stand admitted by appellant.

Moreover, the application of the primary jurisdiction doctrine in the *Cunard* and *Far East Conference* cases turned primarily upon "considerations of administrative expertise" (342 U.S. at 576; 284 U.S. at 485). Administrative expertise could well be a pertinent factor if the issues presented related to the reasonableness or justness of appellant's service (49 U.S.C. 1(5)); or, if the issue were whether there was *"unjust* discrimination" (49 U.S.C. 2) or *"undue* or *unreasonable* preference or *advantage"* (49 U.S.C. 3(1)) in the practice of intentionally delaying shipments for the shipper's accommodation.[19] In spite of the appellant's argument (Br. pp. 24–25), these are not the issues presented to or decided by the district court. The Elkins Act outlaws *any* rebate, concession, discrimina-

[19] *Northern Pacific Ry Co.* v. *Solum*, 247 U. S. 477, involved a suit for refund by a shipper and presented a question of reasonableness. The case has no application here. Similarly, *Boston & Maine Railroad* v. *United States*, 358 U.S. 68, is plainly inapposite. The suit originated in the Commission in a carrier's proceeding for a declaration that various *per diems* "were just and reasonable" (358 U.S. at 71). On a review of the Commission's order, the district court remanded the case to the Commission for further consideration. In this Court, the Commission indicated a readiness to "proceed in accordance with the terms of the remand", whereupon the Court held the appeal to be premature and it was accordingly dismissed.

tion or advantage given or practiced by a common carrier (49 U.S.C. 41(1)) and provides for a summary judicial proceeding to compel a discontinuance of the violations (49 U.S.C. 43). Whether appellant's delayed service, without tariff specification, is within this broad proscription presents legal questions that are cognizable by the courts even though, in a proper administrative proceeding (such as that now before it), it is for the Commission to determine the broader, more complex, questions of whether, with tariff specification, a particular service is reasonable and just in the light of all the circumstances, or unduly preferential or discriminatory. Until appellant specifies its service in tariff form, it cannot properly urge that it requires "administrative expertise" or "competence" to resolve that it is now operating outside the law. See the cases cited *supra,* pp. 34–35.

(b) Neither do considerations of uniformity provide a basis for applying to this case the principle of primary jurisdiction. One of the purposes of this suit, the pending action against the Northern Pacific Railway (*supra,* p. 28, n. 13), and contemplated similar suits against other carriers who may be engaging in intentional and unnecessary delays in transit, is to compel the uniform application of demurrage tariffs and an equal, non-discriminatory treatment of all shippers by all carriers. For the courts to entertain these suits involves no risk that a lack of uniformity will result. Cf. *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.,* 204 U.S. 426. The avenue of the direct appeal to this Court obviates the possibility of divergent opinions by the district courts (cf. App. Br., pp. 17–

18). And, just as an affirming decision by this Court will assure judicial uniformity, it will also materially advance the Commission's objective of bringing all carriers within the law.[20]

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the district court should be affirmed.

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MARCH 1960.

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[20] "The suppression of abuses resulting from violations of § 6(7) would be rendered practically impossible if the Commission were required to suppress all simultaneously or none. Section 12(1) imposes on the Commission the duty to enforce the provisions of the Act. That duty under § 6(7) would hardly be performed if the Commission were to decline to enforce it against one because it could not at the same time enforce it against all." *United States* v. *Wabash R. Co.*, 321 U.S. 403, 414.

APPENDIX

Section 6 of the Interstate Commerce Act (24 Stat. 380, as amended, 49 U.S.C. 6) provides in part:

> SEC. 6. (1) Every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation * * *. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. * * *.
>
> * * * * * *
>
> (7) No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges

which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

* * * * *

Sections 1 and 3 of the Elkins Act (32 Stat. 847, 848, as amended, 49 U.S.C. 41, 43) provide in part:

SEC. 1. * * * The willful failure upon the part of any carrier subject to said Acts to file and publish the tariffs or rates and charges as required by said Acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor * * *; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. * * *

* * * * *

SEC. 3. Whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discriminations forbidden by law, a petition may be presented alleging such facts to the district court of the United States sitting in equity having

jurisdiction; and when the act complained of is alleged to have been committed or as being committed in part in more than one judicial district or State, it may be dealt with, inquired of, tried, and determined in either such judicial district or State, whereupon it shall be the duty of the court summarily to inquire into the circumstances, upon such notice and in such manner as the court shall direct and without the formal pleadings and proceedings applicable to ordinary suits in equity, and to make such other persons or corporations parties thereto as the court may deem necessary, and upon being satisfied of the truth of the allegations of said petition said court shall enforce an observance of the published tariffs or direct and require a discontinuance of such discrimination by proper orders, writs, and process, which said orders, writs, and process may be enforceable as well against the parties interested in the traffic as against the carrier, subject to the right of appeal as now provided by law. It shall be the duty of the several United States attorneys, whenever the Attorney General shall direct, either of his own motion or upon the request of the Interstate Commerce Commission, to institute and prosecute such proceedings, and the proceedings provided for by sections 41, 42, or 43 of this title shall not preclude the bringing of suit for the recovery of damages by any party injured, or any other action provided by chapter 1 of this title. And in proceedings under said sections and chapter 1 of this title the said courts shall have the power to compel the attendance of witnesses, both upon the part of the carrier and the shipper, who shall be required to answer on all subjects relating directly or indirectly to the matter in controversy, and to compel the production of all books and papers, both of the carrier and the shipper, which relate directly or indirectly to such transaction; the claim that such testimony or evidence may tend to criminate the person giv-

ing such evidence shall not excuse such person from testifying or such corporation producing its books and papers, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence documentary or otherwise in such proceeding: *Provided,* That the provisions of sections 44 and 45 of this title shall apply to any case prosecuted under the direction of the Attorney General in the name of the Interstate Commerce Commission.

INTERSTATE COMMERCE COMMISSION

INVESTIGATION AND SUSPENSION DOCKET NO. 7050

LUMBER—FREE TIME ALLOWANCE AT HOLD POINTS

Decided July 31, 1959

Proposed schedules providing 15 days of holding time free of demurrage charges for cars of lumber in transit stopped at certain points in western trunkline territory, and one free diversion, found not shown to be just and reasonable. Schedules ordered canceled, and proceeding discontinued.

Charles H. Clay, L. S. Hamilton, W. M. Kirkpatrick, R. R. Merrill, Don McDevitt, Warren H. Ploeger, Elden A. Thorp, and *Edgar Vanneman, Jr.,* for respondents.

William B. Adams, W. C. Cole, H. F. Easterling, Hugh A. Gillis, Frank Loughren, G. H. Shafer, and *E. C. Schmitt* for protestants.

Daniel M. O'Donoghue for Bureau of Inquiry and Compliance, Interstate Commerce Commission.

Report of the Commission

Division 2, Commissioners Winchell, Hutchinson and McPherson

By Division 2:

Due and timely execution of our functions under section 15(7) of the Interstate Commerce Act imperatively requires that no proposed report be issued in this proceeding. Requested findings not discussed in this report nor reflected in our findings or conclusions have been considered and found not justified.

By schedules filed to become effective on November 2, 1958, and later, seven rail respondents [1] proposed to hold cars loaded with lumber for a period of 15 days free of demurrage charges at 19 points in western trunkline territory. In addition, three of these respondents proposed one free diversion en route for such shipments. The Chicago, Burlington & Quincy Railroad Company proposed to grant one free diversion only. This respondent, the Illinois Central, and the Minneapolis & St. Louis entered no appearance at the hearing. Upon protest of the Western Pine Association, the Southern Pine Association, and the Georgia-Pacific Corporation, the proposed schedules were suspended until June 2, 1959, when they became effective. These protestants, the Douglas Fir Plywood Association, the Forest Products Division of the Olin Mathieson Chemical Corporation, the Bureau of Inquiry and Compliance of this Commission, and 14 firm-order lumber companies located in mountain-

[1] Chicago and North Western Railway Company; Chicago, Rock Island & Pacific Railroad Company; Chicago, Milwaukee, St. Paul & Pacific Railroad Company (called the Milwaukee); Denver & Rio Grande Western Railroad Company; Illinois Central Railroad Company; Minneapolis & St. Louis Railway Company; and Minneapolis, St. Paul & Sault Ste. Marie Railroad Company (called the Soo line).

Pacific territory presented evidence in opposition to the proposed schedules.

Respondent Chicago and North Western Railway Company moves that we reverse five rulings of the hearing examiner on the admissibility of certain evidence. The testimony of a lumber wholesaler, offered on behalf of certain other wholesalers, was excluded because he lacked personal knowledge of their operations. The witness was permitted to testify to facts within his own knowledge concerning such operations. Secondly, a witness' interpretation of certain language in letters, prepared by firms supporting respondents, authorizing him to testify on their behalf as to their mutual interest in maintaining the present routing practices, was excluded. The language was clear. If an interpretation were necessary, the proper parties to give such would be the firms which prepared the letters. Thirdly, the examiner permitted counsel for one of the protestants to state on the last day of the hearing that, if they were to appear, the testimony of certain lumber mill owners would be similar to that of the witnesses which had already testified. The statement should not have been admitted and will not be considered in the disposition of this proceeding. Fourthly, at the request of the Bureau of Inquiry and Compliance, the examiner took official notice of Service Order No. 910, *Regulations for the Movement of Loaded Freight Cars*, 298 I.C.C. 371. The Chicago & North Western urges that this violates the provisions of rules 1.80 and 1.81 of our General Rules of Practice. Neither of these rules concerns the matter of official notice of this Commission's reports and orders. Finally, the examiner admitted certain evidence presented by the Bureau intended to show "what the existing service is." The evidence concerns certain practices of the railroads

prior to 1958. The Chicago & North Western urges that this evidence is irrelevant since it does not concern the recent practices of the respondents nor the proposed schedules. In an investigation and suspension proceeding, we are not restricted to a narrow consideration of the proposed tariff rules. See *Ayrshire Corp.* v. *United States,* 335 U.S. 573. The evidence also supports other witnesses who testified that the same practices were continued up to the present time. Except to the extent indicated, the motion is overruled.

Effective July 12, 1958, certain Canadian railroads published tariffs providing for 15 days' free time for cars of lumber held at Moose Jaw, Saskatchewan or Winnipeg, Manitoba. To remain competitive and for other reasons, each of the respondents by independent action published the proposed schedules, all of which are subject to expiration dates. The proposed schedules of the Soo Line provide that only one stop for 15 days of free time will be allowed in the United States, and do not provide this service whenever it is provided by other respondents prior to arrival of a car on its line. The proposed schedules of the other respondents have no such restriction, and thus a series of 15-day free-time periods would be available depending on the routing of a given car. Some of the respondents state that they are willing to restrict their schedules to only one 15-day free period for each carload of lumber.

Several "in-transit" lumber dealers appeared in support of the respondents. These dealers are jobbers or brokers who ship lumber before they have a buyer for it. They buy their lumber, generally called green dimension lumber, mostly from small saw mill operators in mountain-Pacific territory and Canada.[2]

[2] Most of these dealers have their headquarters in mountain-Pacific territory, but some are in the South or New England.

Neither the dealers nor the saw mill operators have warehouses, so after the lumber is milled, it is loaded immediately into rail cars for shipment. Normally, it is moved in boxcars in shipments weighing from 40,000 to 50,000 pounds. While the cars are in transit the dealers mail out lists of these cars, describing their contents, to prospective buyers. This type of marketing takes time, and thus these dealers would like to have their cars held at certain points on the lines of the respondents for 15 days before the demurrage charges begin to accrue. After a carload of lumber is sold, it is then reconsigned by the dealer to the buyer by fast rail service. Thus, in-transit marketing[3] needs two services of value, namely, slow service to the hold point or points, and fast service beyond.

At present, the respondents provide the slow service by two methods. By the first, the shipper may request the carriers to delay his cars for several days along the direct route to the hold point.[4] Some of the respondents recognize that this method violates section 6(7) of the Interstate Commerce Act and section 1 of the Elkins Act, because no provision therefor is made in their tariffs and there is no charge for the service. In *United States* v. *Union Pacific Railroad,* 173 F. Supp. 397, decided April 3, 1959, the United States District Court for the Southern District of Iowa said:

> This Court wants it to be clearly understood that it is not hereby holding that the 14-day delay in service now being practiced by the defendant is unreasonable. What this Court is holding is that any intentional delay in the service offered by the defendant must be published in tariff form so that the Interstate

[3] In-transit marketing should not be confused with the transit privileges on lumber which the railroads publish in their tariffs.

[4] The Soo Line has never offered this service.

Commerce Commission can then determine if such delay is reasonable or unreasonable under the circumstance.

By the second method, the shipper may consign his lumber over circuitous routes to the hold points, as provided in the respondents' tariffs. There is evidence that in-transit shippers have gained a delay of more than 15 days by routing the traffic over circuitous routes. However, this method has certain disadvantages. The shipper does not know the location of the car as it moves over the circuitous route, which in many instances embraces the lines of several connecting carriers. When the shipper finds a buyer, each carrier must be contacted until one of them locates the car, which is then reconsigned or diverted to the buyer. The proposed schedules have the advantage of permitting the in-transit dealers to route their cars over a direct route to the hold point, where the cars would be more readily available once a buyer is found.

The protestants introduced the in-transit lists of 18 lumber dealers, none of whom appeared at the hearing. The lists were dated from January 2 to 8, 1959, and offered for sale a total of 630 carloads of lumber, 44 of which originated in Canada. Some of the cars had been under load over 35 days at the time the lists were mailed out. The in-transit dealers who appeared at the hearing stated that they employ similar lists, but none was offered in evidence. One of these dealers sells about 7,000 carloads a year, 90 percent of which is in-transit lumber. He has had as many as 330 cars rolling at one time. A group of 9 of these dealers sells about 10,000 carloads each year, 85 percent of which is in-transit lumber.

The firm-order lumber dealers who oppose these schedules are large wholesalers located in mountain-

Pacific, southern, and southwestern territories. They sell their lumber, generally called kiln-dried lumber which competes with green dimension lumber in many markets, and mill it to the buyer's specifications before shipment. They have adequate warehouse facilities and storage yards for their lumber. These dealers oppose the proposed schedules because they, in effect, provide the in-transit dealers with 15 days of free warehousing. The respondents emphasize that the in-transit dealers are and have been receiving free warehousing for many years by routing their traffic over circuitous routes. However, there is no indication that the bulk of this traffic is or has been moving over such routes. The firm-order dealers contend that circuitous routing of in-transit lumber contributes to a boxcar shortage, and for this reason they are opposed to allowing any shipper 15 days of free time.

The present free time of 24 hours has been in effect for many years, and it applies generally on all traffic. After this free time expires, demurrage charges are applied. The respondents point out that their present demurrage tariffs provide exceptions on certain kinds of traffic, but the reasons for such exceptions are not present here.

The proposed schedules would save the in-transit dealers a maximum of $96 demurrage ($4 per day for the first four days after the free time, and $8 per day thereafter). However, the respondents must pay per diem for "foreign" cars used by them at the rate of $2.75 per day, or $38.50 for 14 days. Thus, on foreign cars loaded with lumber now moving over noncircuitous routes in regular service, these schedules would permit the use of such cars for storage purposes up to a maximum of 15 days at one point. For this service the respondents would receive no revenue,

but would incur the above per diem expenses or in the case of their own equipment would be deprived of its use for revenue producing purposes. Whether or not, after deducting such an amount, the through transportation charges on this traffic would be compensatory is not determinable from the record before us.

Most of the lumber originating in mountain-Pacific territory and held at the 19 designated points is destined to official territory. A large volume of lumber also moves from and to those areas by water via the Panama Canal. The vessels require minimum shipments of 500,000 to 750,000 board feet of lumber,[5] and thus a number of in-transit shippers would have to pool their shipments to meet this minimum requirement. Since each shipper normally finds a different buyer along the east coast, this route is impractical for in-transit marketing. From southern and southwestern territories to official territory in 1957, 25 percent of the pine lumber moved by rail and 75 percent by truck. There is no evidence that motor carriers transport any of this transcontinental traffic. In 1947, the volume of American lumber[6] moved by the railroads, including in-transit lumber, totaled 34,414,600 tons, as contrasted with 19,041,300 tons in 1957. There is no evidence of record that any in-transit traffic originating in mountain-Pacific territory was lost to other modes of transportation.

On July 12, 1958, certain Canadian railroads also published tariffs permitting one free diversion of lumber held at Moose Jaw and Winnipeg. To remain competitive, four of the respondents are here

[5] The weight of one of these cargoes varies with the type of lumber. As an example, 500,000 board feet of green surfaced douglas fir weighs about 650 net tons.

[6] This includes lath and shingles.

proposing a like provision for points on their routes, but little evidence was presented in support thereof. Neither the respondents' witness nor the supporting shipper knew specifically what the present charge was for one diversion of a shipment of lumber. The respondents point out that their tariffs allow three free diversions for shipments of fruits and vegetables, but no evidence was offered to show that the transportation needs in this respect are the same as those of fruits and vegetables.

The respondents urge that 15 days' free time for this traffic is necessary to meet the competition of the Canadian railroads, as well as the delayed or circuitous routing of this traffic. They also state that the proposal suits the commercial needs of the in-transit dealers and small saw mill operators, who, it is feared, will go out of business if the schedules are not approved. However, one of the in-transit dealers testified that, even if the schedules are not approved, western lumber will continue to be marketed by the in-transit system.

With regard to the competition from Canadian carriers, no evidence has been submitted that in-transit lumber originating in the United States has been routed through Canada because of the 15 day free time period available for holding lumber at named points in that country. As shown, circuitous routing entails disabilities not encountered when the lumber is moved over a more direct route. Furthermore, the respondents who participate in circuitous routes are not prohibited from restricting their rates so as to apply only over such routes as they consider to be reasonable.

Finally, the respondents urge that in times of car shortages the Commission should exercise its authority to prevent car delays through emergency service

orders suspending the 15 day free time period. In *Increased Demurrage charges, 1956,* 300 I.C.C. 577, the Commission stated that this method was not satisfactory nor a proper substitute for reasonable demurrage rules and charges applicable generally throughout the United States.

Discussion and conclusions.—As the respondents indicate, under the proposed schedules the in-transit dealers would obtain free warehousing from the railroads as they do under the present method of circuitous routing. However, the proposed 15-day period of free time would give these dealers certain advantages which they do not enjoy when the traffic is consigned over circuitous routes. These advantages would unjustly discriminate against competing firm-order dealers.

Demurrage rules and charges are designed primarily to discourage the detention of cars by shippers. *Pennsylvania R. Co.* v. *Kittanning Co.,* 253 U.S. 319, 323. As stated by the Commission in *Increased Demurrage Charges, 1956, supra,* at page 585: "No shipper * * * has an inherent right to detain cars beyond free time and thus prevent their use by other shippers for the transportation of goods in the general public interest." On the record made, we conclude that the proposed schedules would encourage undue detention of cars at a time when there is a shortage of cars on the railroads generally; would provide for service beyond the primary duties of railroads under line-haul rates; would open the door to like demands from shippers of other commodities similarly circumstanced; and would contravene the national transportation policy to promote adequate, economical, and efficient service and foster sound economic conditions in transportation.

The evidence presented by the respondents in support of the one free diversion proposed on this traffic is meager, and is wholly inadequate upon which to rest a finding that the proposal is just and reasonable.

We find that the proposed schedules are not shown to be just and reasonable. An order will be entered requiring their cancellation and discontinuing the proceeding.

COMMISSIONER MCPHERSON did not participate.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, held at its office in Washington, D.C., on the 31st day of July, A.D. 1959.

INVESTIGATION AND SUSPENSION DOCKET NO. 7050

LUMBER—FREE TIME ALLOWANCE AT HOLD POINTS

It appearing, That by orders dated October 27, 1958, and later, the Commission entered upon an investigation concerning the lawfulness of the rates, charges, regulations, and practices stated in certain schedules described in said order, and suspended the operation of the schedules to and including June 1, 1959;

It further appearing, That a full investigation of the matters and things involved in this proceeding has been made, and that said division has made and filed a report herein containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That the respondents here'n be, and they are hereby, notified and required to cancel the said schedules on or before September 8, 1959, upon

not less than 1 day's notice to this Commission and to the general public by filing and posting in the manner prescribed by this Commission, and that this proceeding be, and it is hereby, discontinued.

By the Commission, division 2.

[SEAL] HAROLD D. MCCOY,
Secretary.

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D.C., on the 21st day of December, A.D., 1959.

INVESTIGATION AND SUSPENSION DOCKET NO. 7050

LUMBER—FREE TIME ALLOWANCE AT HOLD POINTS

Upon consideration of the record in the above-entitled proceeding; petition of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company and the Illinois Central Railroad Company, filed September 1, 1959, for reconsideration of the report and order of Division 2, decided July 31, 1959; petitions of the Chicago and North Western Railway Company and the Rock Island Lines, filed September 3 and September 4, 1959, respectively, for reconsideration of the aforementioned report and order and request for oral argument; and replies thereto by the Bureau of Inquiry and Compliance of this Commission and protestant, Southern Pine Association, filed September 22, 1959, and reply of various other protestant lumber interests, filed September 24, 1959; and for good cause appearing:

It is ordered, That the petitions for reconsideration be, and they are hereby, granted, and that this proceeding be, and it is hereby, reopened for reconsideration on the present record;

It is further ordered, That, in all other respects the petitions, be, and they are hereby, denied for the reason that the matters submitted in support thereof do not present substantial and material grounds to warrant granting the action sought;

And it is further ordered, That the order entered in this proceeding on July 31, 1959, which order, pursuant to section 17(8) of the Interstate Commerce Act, was stayed pending disposition of the petitions, be, and it is hereby, reinstated, and modified so as to postpone the effective date thereof until the further order of the Commission.

By the Commission.

[SEAL] HAROLD D. MCCOY,
Secretary.

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JAMES R. BROWNING

No. 98

In the Supreme Court of the United States

October Term, 1959

UNION PACIFIC RAILROAD COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA,
WESTERN DIVISION

BRIEF FOR APPELLANT

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In the Supreme Court of the United States

October Term, 1959

No. 98

UNION PACIFIC RAILROAD COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA, WESTERN DIVISION

BRIEF FOR APPELLANT

OPINION BELOW

The findings of fact, conclusions of law and opinion of the District Court for the Southern District of Iowa are reported at 173 F. Supp. 397 (R. 196-222). The Order Granting Summary Judgment and Order Granting Injunction appear at R. 223-225.

JURISDICTION

This suit was brought by the United States of America under the act commonly known as the Elkins Act, 49 U. S. C. §§ 41(1)-43, to enjoin appellant from allegedly violating section 6(7) of the Interstate Commerce Act (49 U. S. C. 6(7)) and section 1 of the Elkins Act by performing, in order to compete with longer, circuitous routes, a

slow service in transporting lumber over its shorter, direct route for all shippers requiring such service, at the same published tariff rates appellant and the circuitous routes charge for fast service in transporting lumber, without the train schedules or operating time consumed in performing either the fast service or the slow service being specified in published tariffs, or any *extra* charge being made or published for the slow service. The summary judgment (R. 223) and injunction of the district court (R. 224) were entered on April 3, 1959, and notice of appeal was filed in that court by appellant on April 10, 1959 (R. 231). Jurisdiction of this Court to review this case on direct appeal is conferred by 49 U. S. C. § 45. Probable jurisdiction was noted October 12, 1959, and the case was transferred to the summary calendar (R. 240), 80 S. Ct. 55.

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act (49 U. S. C.), sections 1(3)(a), (4), (10), (14), (15) and 6(1) and (7), and of the Elkins Act (49 U. S. C.), sections 41(1) and 43, involved in this appeal, are set forth in the Appendix hereto.

QUESTIONS PRESENTED

1. Whether, in view of its conclusions that "it is the function of the Interstate Commerce Commission to determine whether or not a delay in service is reasonable under all the facts and circumstances involved," and its finding of fact that after the Complaint herein was filed, the Commission instituted and now has under consideration its own investigation concerning the lawfulness of a 15-day "hold" service in the transportation of lumber by several other railroads (not including appellant), to make such findings and order as the facts may warrant, the district court erred in refusing to apply the settled rule of pri-

mary administrative jurisdiction applied by this Court in *U. S. Nav. Co. v. Cunard S. S. Co.*, 284 U. S. 474; *Director General v. Viscose Co.*, 254 U. S. 498; *Far East Conf. v. United States*, 342 U. S. 570; *Boston & Maine Railroad v. U. S.*, 358 U. S. 68, and other cases, and, thereupon to dismiss the complaint.

2. If question 1 is answered negatively, whether the district court erred in making the administrative decision, in effect, that appellant may not lawfully perform a slow or delayed transportation service for the same published tariff rates it charges for performing "normal" or fast service.

3. Whether, in view of its correct finding of fact that appellant's slow service is performed for *all* traffic of *all* shippers alike desiring slower service, and the fact that appellant collects for the slower service and retains the full "published and approved tariff rates," the district court erred in holding that appellant's offering and performing the slower service constitutes "a device for the offer and gift of rebates, concessions, advantages, and discriminations in violation of the Elkins Act" whereby lumber of shippers requiring the slower service is transported by appellant "at less than the published rates on file with the Interstate Commerce Commission."

4. Whether, since appellant concededly collects and retains for performing the slower service, the "published and approved tariff rates" lawfully on file with the Interstate Commerce Commission specifying the rates and charges for transporting lumber, the district court erred in enjoininig appellant from performing the slower service "unless and until such time, if at all, as there is in force with respect to the Union Pacific Railroad Company, defendant

[appellant], a tariff lawfully on file with the Interstate Commerce Commission naming the rates and charges for such privileges or facilities."

5. Whether, in view of the fact that there is no provision of law or any order, rule or regulation of the Commission expressly requiring appellant to publish in its tariffs the speed or schedules of its trains or time it will consume in performing transportation service, the district court erred in holding that any intentional slow or delayed service offered by appellant must be published in tariff form, and that competitive necessity provides no legal defense to this action.

STATEMENT

The Government's Complaint and its presentation of this case imply or make it appear that appellant has selected, singled out and connived with certain shippers of "roller" lumber by offering and performing for them a special, slow lumber movement for their special benefit, to the exclusion of so-called "firm order" lumber shippers and shippers of all other commodities, and has thereby granted to the "roller" lumber shippers special benefits, privileges, facilities and concessions not offered or granted to other lumber shippers or shippers of other commodities (R. 1-7).

Whether intentional or not, this misleading treatment of the case results in distortion of the facts and in implications which are contrary to the undisputed fact of record that appellant's slow service, as well as its fast service, is offered to and performed for any and all shippers requesting such service and for any traffic that any shipper may desire to be handled in that service (R. 127-128).

> "Defendant [appellant] has made and does make available the performance of the slower freight serv-

> ice for all shippers desiring such service, including shippers of lumber, fruits and vegetables and other commodities, and defendant [appellant] has not withheld from any shippers the privilege of availing themselves of such slow service; that defendant [appellant] has not selected or acted secretly with any particular shippers in offering and performing such slower service; or withheld from any shipper the privilege of equally availing itself of such slow service or the use of freight cars, trackage and other facilities for such slow service and has not performed any service or afforded any facility for any shippers at less or different compensation than the regularly published tariff rates applicable via its line and applicable and available to the same shippers for the same or greater service and facilities via the longer circuitous routes described in paragraph 9 above."

The misleading implications are also contrary to the district court's finding 30 (R 203):

> "That defendant [appellant] has made and does make available the performance of the slower freight service for all shippers desiring such service, and has not selected nor acted secretly with any particular shippers in offering and performing such slower service. That nevertheless, the main users of such delayed service are certain lumber shippers."

Also, despite the fact that all of the numerous railroads participating in transcontinental routes compete for the "roller" lumber traffic (see railroads named in routes described, R. 117-121) and practically all of them offer and perform a slow service when requested by shippers for movement of lumber under circumstances identical to those under which appellant performs its slow service (see *Regulations For The Movement of Loaded Freight Cars*, 298 I. C. C. 371, 375-376), the Government has singled out this appellant railroad and seeks to enjoin it from competing

on equal terms with the numerous other railroads that will be free to continue performing slow service for the "roller" lumber traffic.[1]

"ROLLER" TRAFFIC

For many years, under certain commercial marketing conditions and distribution methods, shippers of various commodities have required, and railroads have provided, flexibility and variation in train schedules and transit time for movement of commodities from place of production to final markets or places of consumption (R. 116).

It is an established practice of long standing in the shipping, distributing and marketing of commodities under certain market conditions for shippers to consign shipments to themselves to some intermediate point, deliver the shipments to railroads and start them on their way from point of production before they have found buyers for the commodities, and to search for buyers while the commodities are moving in the direction of and nearer to markets where the shippers know from experience that they will ultimately find buyers. Such traffic is commonly called and will be referred to herein as "roller" traffic. When a buyer is found, the shipper gives a "reconsignment" or "diversion" order to the railroad having possession of the shipment, reconsigning or re-billing the shipment on the through rate to the newly found destination and buyer (R. 116).

Reconsignment or diversion of traffic while in transit is an established commercial practice of long standing and is fully authorized by railroad tariffs duly filed and pub-

1 The Government has filed a similar action against only one other railroad. In the District of Minnesota, it filed a suit entitled *United States of America v. Northern Pacific Railway Company*, Civil Action No. 3-57-164, which is being held in abeyance in that court.

lished with the Interstate Commerce Commission (R. 117). The reconsignment or diversion privilege which enables shipments to move from origin to final destination at the through rate is the "key" to this method or practice of transporting, distributing and marketing "roller" traffic. The practice has been long and well known to the Commission and has received its approval.[2]

Shippers of "roller" traffic generally desire a longer time for movement of such traffic than is required if the buyer and final destination of the shipment are known before the traffic moves from point of production or origin. To obtain such longer time in transit for such "roller" traffic, shippers have for many years followed the established practice of routing such traffic over longer or circuitous routes over which, as in the instant case, their

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2 In *Detroit Traffic Asso. v. L. S. & M. S. Ry. Co.*, 21 I.C.C. 257 (decided in 1911), the Commission said at p. 259:

"The primary economic advantage of reconsignment is found in the increase in the fluidity and regularity of the movement of commodities; there is an important elimination of economic waste in the reduction of the handling of goods between the producer and the consumer, celerity of movement is increased, the direction of commodities to the point of most active demand is facilitated. In other words, *reconsignment increases the efficiency of transportation facilities in performing their most important function of bringing together supply and demand.* The shipper of perishable products is enabled to divert his shipment from a market already overstocked, thus often converting a prospective loss into a gain; he is enabled to take advantage of his latest possible information as to market conditions. Similar advantages are seen in the movement of lumber and grain and other commodities of universal necessity." (Italics added.)

In *Central Commercial Co. v. L. & N. R. R. Co.*, 27 I.C.C. 114 (decided May 12, 1913), the Commission said at page 115:

"Diversion and reconsignment are required in the conduct of modern business and are to be regarded as commercial necessities. Many of the railroads of the country permit the practices and thousands of carloads of coal, lumber, fruit and vegetables, and other commodities are reconsigned and diverted annually upon the payment of the through rate, point of origin to destination, with or without charge per car for the service rendered in making the diversion in the movement."

shipments move at the same tariff rates and charges at which they move over shorter direct routes (R. 116). This practice of shippers routing their "roller" traffic over longer circuitous routes to obtain more time in transit to enable them to find buyers has also received the Commission's approval.[3]

To compete with the longer circuitous routes for such "roller" traffic, railroads, such as appellant, having the shorter direct routes must render a transportation service which is slower than they accord traffic not requiring such longer transit time (R. 116).

Establishment and maintenance at the same tariff rates, fares and charges, by appellant and other railroads of fast, slow or different speeds of freight train schedules and services, adjusted for competition with competing railroad lines and routes, and to the marketing and distribution needs of patrons, is a practice that has always prevailed in competitive railroad transportation operations in the United States (R. 122).

Appellant, having a shorter, if not the shortest, transcontinental railroad route, has provided, from time to time during at least the past 20 years, for such "roller" traffic requiring such longer time in transit a service designated as "SMX," an abbreviation meaning "slow manifest service" (R. 116). In that service shipments are moved from division or subdivision terminal to the next division or subdivision terminal in "local" or "drag" trains regu-

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3 In *Quality Gas & Oil Co. v. Northern Pac. Ry. Co.*, 185 I.C.C. 395 (1932), the Commission said at p. 398:

"* * * Indirect [circuitous] routes result from the desire of the carrier having the long route to compete with the line maintaining the short route. Under such circumstances, the shipper has the right to designate which of the competing routes shall be used. The preservation of a competitive status as between carriers may be regarded as justifying such a right."

larly operated in the process of moving the available traffic, rather than in "through" trains (R. 122).

"ROLLER" LUMBER TRAFFIC

While the Complaint in this case has singled out "roller" lumber traffic, the fact, as stated in the district court's finding 12 (R. 199), is that appellant's slow service has always "applied to the movement of both perishable and dead freight, including lumber, and all other traffic of any shippers requiring slow service," although "roller" lumber traffic from the Northwest to the East, to which the Complaint and injunction are limited, constitutes the bulk of the traffic presently using such service.

In order to produce the vast quantity of lumber required during World War II, numerous small lumber mills commenced operation in the Northwest area of the United States, mainly in northern California, Oregon and Washington. These small mills did not have any established commercial market, as their production was primarily for war requirements. To remain in business when the war demand ended, it was necessary for these small mills to develop a method of merchandising adaptable to their operations, and the so-called "roller" or "transit" method of lumber marketing resulted. In this type of marketing, a negotiable instrument covering the shipment is turned over to wholesalers or brokers who endeavor to locate a purchaser while the shipment is moving eastward. When a sale is consummated the transfer to the buyer is accomplished through "diversion" or "reconsignment" instructions to the railroad while the shipment is en route (R. 116).

Most of this lumber moves to markets in the United States east of the Missouri and Missippi Rivers over the

lines and routes of several railroads which directly serve the Northwest area and which, with connecting lines, form numerous through routes with equal joint rates applicable thereto. The routes so formed vary in length and some of them are much longer than others. For example, the direct route via Union Pacific from Portland, Oregon, to Chicago, Illinois, is 2,259 miles, while routes via other railroads between those points are as much as 1,564 miles longer than the Union Pacific route. From Medford, Oregon, to Joliet, Illinois, the direct route via Union Pacific is 2,445 miles, while other routes are as much as 1,745 miles longer. From Smith Flat, California, to Chicago, Illinois, the Union Pacific direct route is 2,232 miles, while other routes are as much as 1,850 miles longer (R. 117-121).

As in the case of other "roller" traffic, shippers route "roller" lumber traffic over the longer circuitous routes requiring more time in transit, to enable them to find buyers while the shipments are moving eastward; and, in such circumstances, the "roller" lumber traffic is lost by the shorter routes, including this appellant's route, because of the longer time in transit utilized by the longer routes (R. 121-122). For example in the first month of a period during which the Commission had outstanding an emergency order prohibiting all railroads from performing slow movement of lumber, appellant lost over $500,000 in gross revenue because of shippers' routing over long circuitous routes lumber traffic appellant previously handled in slow service (R. 146).

It is an ironical fact that by granting rate relief from section 4 of the Interstate Commerce Act the Commission itself approved many of the long circuitous routes to compete at the same rates with the shorter, direct routes, in-

cluding the route of this appellant, which the Government now seeks to prevent from competing with the long circuitous routes for the "roller" lumber traffic, *Commodity Rates on Lumber and Other Forest Products*, 151 I. C. C. 763; 165 I. C. C. 561.

The fantastic circuity of some of the routes that compete at the same rates with the shorter, direct routes for the lumber traffic is graphically illustrated by two maps of record (R. 130-133). The wastefulness of the extreme circuitous routes, compared to the direct routes, in miles of transportation and number of interchanges of cars between connecting railroads is obvious from the description of illustrative routes at R. 117-121, from which the following extreme example is taken:

From Smith Flat, Calif., to Chicago, Ill.

Direct Route:

Camino, Placerville & Lake Tahoe Railroad to Placerville, California, Southern Pacific Company to Ogden, Utah, Union Pacific Railroad Company to Council Bluffs, Iowa, Chicago, Burlington & Quincy Railroad to Chicago, Illinois ..... 2232.5 miles.

Circuitous Route:

Camino, Placerville & Lake Tahoe Railroad to Placerville, California, Southern Pacific Company to Ogden, Utah, Union Pacific Railroad Company to Denver, Colorado, The Atchison, Topeka and Santa Fe Railway Company to Snyder, Texas, Roscoe, Snyder and Pacific Railway Company to Roscoe, Texas, The Texas and Pacific Railway Company to Sweetwater, Texas, Panhandle and Santa Fe Railway Company to

Houston, Texas, Texas and New Orleans Railroad Company to Dallas, Texas, St. Louis, San Francisco and Texas Railway Company to Sherman, Texas, St. Louis-San Francisco Railway Company to Kansas City, Missouri, Union Pacific Railroad Company to Council Bluffs, Iowa, Chicago and North Western Railway Company to Chicago .....4083.6 miles.

Miles longer than direct route.....1851.1

It is noted that the above Union Pacific direct route requires little more than half the miles of transportation required by the circuitous route and that the direct route also requires only three interchanges of carloads between connecting carriers, while the circuitous route requires eleven car interchanges.

From carload unit cost data prepared and published by the Commission itself,[4] it is calculated that the fully distributed costs of hauling a 30-ton box car load over a 4,000-mile circuitous route in the Western District is $1,338.41 and that the fully distributed cost of hauling the same carload over a 2,200-mile direct route within the Western District is $774.11; or, an additional and wasteful cost of $564.30 in transporting a carload of lumber over the longer circuitous routes, many of which were approved by the Commission.

TARIFF PUBLICATION

Appellant in conjunction with numerous other railroads publishes and files with the Commission, in conformity with section 6 of the Act, tariffs of rates and charges,

4 Interstate Commerce Commission Statement No. 5-59, "Rail Carload Cost Scales By Territories For The Year 1958," December 1959, Table 2, page 63, columns (2), (3), (4) and (5).

rules and regulations governing line-haul transportation service and accessorial services, including diversion, reconsignment and demurrage charges, applicable to lumber and other commodities in carloads from points in Oregon, Washington and other western states. The same rates are charged and collected regardless of whether lumber moves in slow or fast service, or whether it moves over the shorter direct routes or over the longer circuitous routes.

The tariffs do not specify or provide for or offer the performance of fast, slow or other type service, nor do they publish any operating schedule or "running time" for performance of any transportation service for lumber or any other property by any particular train or in time for any particular market; nor do the tariffs publish or provide for any greater or lesser or additional or different freight charges for transporting one shipment faster or slower than another shipment.

The district court finds that appellant's slow service "contributes the use of its trackage and cars to provide a storage facility for transit lumber shippers," finding 21 (R. 201); and in "added carrier operational problems and costs occasioned by the additional need for power and working crews," finding 23 (R. 202); and in "excessive per diem cost for the use of foreign cars on defendant's [appellant's] line with the resulting tendency to unbalance the defendant's [appellant's] annual per diem offsets with other railroads," finding 24 (R. 202); and enables "roller" lumber dealers to "avoid the payment of demurrage" [which might accrue at destination if the carloads were moved in fast service], finding 25 (R. 202).

The district court concludes that appellant's slow lumber service extends to lumber shippers "privileges and/or facilities" not specified in published tariffs in violation of section 6(7) of the Act and section 1 of the Elkins Act (R. 220), and the injunction enjoins appellant from performing slow service for shipments of lumber "unless and until such time, if at all, as there is in force with respect to the Union Pacific Railroad Company, defendant [appellant], a tariff lawfully on file with the Interstate Commerce Commission naming the rates and charges for such privileges or facilities" (R. 225).

Neither appellant nor any other railroad files or publishes, or has ever filed or published tariffs naming any separate, extra or special rates or charges for the use of their tracks, locomotives, cars or other facilities used in transporting shippers' goods, or specifying the type of service or the operating time schedule within which shipments will be moved.[5]

In addition to tariff publication of their rates, fares and charges for transportation and terminal, storage and

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5 Prospective shippers or passengers generally obtain information concerning railroad train schedules and service at local railroad freight or passenger offices or stations. While railroads generally have all such information compiled and printed in pamphlet form for dissemination to the public, such information has never been required to be published in tariffs or filed with the Commission. These pamphlets are commonly called "timetables" and railroad passengers, for example, are familiar with the custom of railroads in maintaining passenger "timetables" not only in their ticket offices but in their trains and at public information desks in hotels and other places for the convenience of prospective passengers. The railroads also print pamphlets of their freight train schedules, service and operation generally for the information of their operating employees and traffic solicitors, from whom prospective freight shippers readily obtain information concerning freight train schedules, service and other freight transportation information, without the inconvenience of searching for it in published tariffs.

icing charges expressly named, section 6(1) requires railroads to publish "all other charges which the Commission may require."

But there is no provision of law requiring, nor has the Commission ever ordered railroads to specify in their tariffs separate, special or additional rates or charges for the use of their tracks, locomotives, cars or other facilities used in transporting shippers' goods or to publish in tariffs the schedules or "running time" of their trains; or to run one train or to move one shipment no slower or faster than another, or to publish a separate, additional or special charge for slower or faster movement of passengers or goods; or to prevent railroads from adjusting their schedules or train service in an effort to compete with other railroads, or to meet the requirements of commercial marketing and distributing methods.

THE DISTRICT COURT'S DECISION

Although it is undisputed that appellant collects and retains the full published tariff lumber rates on file with the Commission, the district court held that appellant's slow service constitutes a device for the granting of rebates and concessions, advantages and discriminations in violation of the Elkins Act, whereby shippers of "roller" lumber obtain transportation of their shipments at less than the published rates on file with the Commission; and that the slow service extends to shippers privileges and facilities not specified in published tariffs in violation of section 6(7) of the Act (R. 219-220).

Notwithstanding the decision so made and the injunction to enforce it, the court apparently recognizing that it was dealing with problems within the primary jurisdiction of the Commission, held (R. 219):

> "It is the function of the Interstate Commerce Commission to determine whether or not a delay in service is reasonable under all the facts and circumstances involved. Perhaps in certain instances, a delay in service would be reasonable in order to meet the competition of competing carriers with longer physical routes. * * *.
>
> "This Court wants it to be clearly understood that it is not hereby holding that the 14-day delay in service now being practiced by the defendant is unreasonable. * * *."

Thus, although refusing to dismiss the Complaint or remand the case to the Commission despite its recognition that it was not its judicial function to determine the lawfulness or "legal quality" of the slow service, the court nevertheless enjoins the slow service as in violation of law, subject, however, to a possible determination by the Commission that the slow service is "reasonable." This apparently means that if the Commission, though without remand, should determine the slow service to be "reasonable" then the court was wrong in holding that the service violates the Elkins Act and section 6(7) of the Interstate Commerce Act, and that such determination by the Commission would overrule, set aside or supersede the court's decision and injunction.

SUMMARY OF ARGUMENT

I.

As the performance of slow lumber service is not limited to appellant alone but is similarly practiced by nearly all western railroads that compose direct routes in their efforts to compete at equal rates with circuitous routes nearly twice as long as the direct routes, obviously the problem is not susceptible to judicial solution and certainly not by judicial process against this appellant alone. The injunction, if affirmed, would exclude this appellant from the slow lumber traffic while all other railroads would be free to perform that service, and the purpose of Congress to obtain uniformity in practices among railroads would fail. Since the Commission is the only tribunal which has authority to prescribe and require desirable uniformity in practices and services of all railroads performing slow lumber service, it is plain that the district court should have dismissed the Complaint and remanded the case to the Commission for full investigation of the rates and practices in performance of slow lumber service by the circuitous routes, as well as the direct routes, and for such order, if any, as the Commission might deem necessary.

Whether appellant's offering and performing two types of service, i. e., a fast service and a slow service, for all shippers alike and for the same published tariff rates without describing or specifying either service in published tariffs and without making an extra charge for slow service renders the slow service a violation of section 6(7) of the Interstate Commerce Act and section 1 of the Elkins Act, presents, among others, the following fundamental preliminary administrative questions of fact, determination of which is plainly within the Commission's exclusive primary jurisdiction under the Act:

1. whether the published tariff rates collected and retained by appellant are just and reasonable for both the fast and the slow service (section 1(5));

2. whether appellant's performance of both services at the same published tariff rates is a just and reasonable "practice" (sections 1(6) and 15(1));

3. whether appellant's performance of both fast and slow service for all shippers alike at their request for the same published tariff rates is a discrimination against shippers who do not request slow service and a concession or advantage to shippers requesting slow service (sections 2 and 3);

4. whether, since there is no provision of law and the Commission has never issued any order, rule or regulation expressly requiring publication of railroad operating schedules or types of service in published tariffs, appellant's performance of slow service at published tariff rates for all shippers alike, but without description of either the fast or the slow service in published tariffs, renders the slow service a "privilege" not specified in the tariffs within the prohibition of section 6(7) of the Act;

5. whether the prohibition in section 6(7) against any carrier refunding any portion of the rates, fares and charges specified in its tariffs, or extending to any shipper any privileges "except such as are specified in such tariffs", automatically renders appellant's slow service (but not its fast service) unlawful because it is not offered in tariffs published and filed with the Commission.

This Court has consistently held that such questions are questions of fact for the determination of which Congress created the Commission in order to obtain "desirable uniformity" which could not be obtained if the num-

erous Federal courts attempt to decide them (cases cited, *Infra,* pp. 26-38).

As neither the Interstate Commerce Act nor the Elkins Act expressly prohibits or condemns as unlawful the performance of either a slow or a fast service for the same rate or charge, and since appellant admittedly collects and retains the full published tariff rate for both types of service, its slow service may *not,* like a "rebate" [which both Acts expressly prohibit], be condemned "as a thing *ipso facto* illegal and prohibited by the statute"; and since the "legal quality" of the slow service has not—like a rebate or refund to a shipper of a part of the tariff rate—been "definitely fixed by the statute," so, performance of the slow service, "otherwise permissible, is lawful or unlawful, according as it is reasonable or unreasonable," or, in fact, brings about a "discrimination," "advantage" or some other result expressly prohibited by the Act; but to determine such questions involves consideration and comparison of many and various facts and calls for the exercise of the discretion of the Commission. The courts have not been given jurisdiction to fix rates or practices in direct proceedings, nor can they do so collaterally during the progress of a lawsuit (*Infra,* p. 29).

The district court held appellant's slow service unlawful because of the court's basic findings that the slow service contributes "trackage and cars to provide a storage facility" and results in "freight car shortages" and in "additional need for power and working crews," in "excessive per diem cost" to appellant, to the "economic disfavor" of appellant and "detriment of the national policy to maintain economically stable transportation facilities," and to give "advantages" to certain shippers, placing them in "a superior competitive position in the marketing of lumber."

Clearly the district court usurped the administrative functions of the Commission in making these findings of fact and in refusing to dismiss the Complaint and remand the case to the Commission for its own investigation and determination of these facts and issuance of such order, if any, as the Commission might deem necessary.

And, since any order, rule or regulation issued by the Commission as the result of such investigation would be subject to independent judicial review by a specially constituted Federal district court, thus rendering any further court proceedings on the Complaint futile and useless, the district court was clearly required by decisions of this Court to dismiss the Complaint. (Cases cited, *Infra,* pp. 30-39.)

The reasons suggested by the Government in its Motion to Affirm, in attempted justification of the district court's refusal to dismiss the Complaint and remand the matter to the Commission, are without merit or have been considered and rejected in the above decisions by this Court. (*Infra,* pp. 40-45.)

II.

Appellant's performance for all shippers at the same published tariff rate of either a fast or a slow service as elected by the shipper, without tariff specification of operating schedules or time consumed in transit by either type of service and without extra charge for the slow service, does not render the slow service violative of section 6(7) of the Interstate Commerce Act or section 1 of the Elkins Act.

The Government's case and the decision below are bottomed on the postulate that the law prohibits railroads from performing two types of service—fast or slow—for the same published tariff rate. No provision of law nor any order, rule or regulation of the Commission is cited as the

basis for that postulate, and there is none. Instead, it is the result of the following rationale: "It is necessarily implicit in the tariffs that the rates apply to the carrier's 'normal' service" (Motion to Affirm, p. 7); appellant's fast service is its "normal" service and is, therefore, the only service that may lawfully be furnished for the published tariff rates; therefore, slow service and any service other than the fast or "normal" service is a "special service" and may not be lawfully performed for the published tariff rates; although "regular operating schedules are not required to be filed" specifying or offering fast or "normal" service, no service other than the fast or "normal" service may be lawfully performed unless it is specified or offered in published tariffs on file with the Commission naming an extra charge in addition to the published tariff rates for such "special service."

While the court below does not explicitly adopt the Government's "standard" that any service other than fast or "normal" service is unlawful, but by enjoining appellant from performing any lumber freight service whereby lumber shipments are "intentionally delayed", the court indirectly adopts the Government's postulate that only fast or "normal service" may be lawfully performed under the published tariff rates. The court adopts "intentional" slow service as a "standard" of unlawfulness and condemns appellant's slow service, because it is intentionally slower than its fast service, while the Government adopts fast service as "normal" and as the only service which may be performed at the published tariff rates. Although employing different word technique the Government and the court arrive at the same conclusion, namely, that any service which is intentionally slower than appellant's fast service is *ipso facto* unlawful unless specified in appellant's published tariffs and an extra charge made for it. Neither of these newly invented but wholly erroneous and untenable "standards" could be employed in railroad oper-

ation. What is "normal" service for one type of traffic under one set of circumstances would not be "normal" for other traffic or for the same traffic under different circumstances. Every operating schedule is necessarily "intentional" and is made in an effort to meet the necessities of competitive railroad operation and the needs of the traffic under the circumstances offered by shippers.

But the Act does not set up a "standard" of service to be performed for the published tariff rates; it does not specify or define "normal" service; and in fact it does not specify or mention any type or the quantum of service that may be performed for the published tariff rates. Neither counsel for the Government nor the court below is at liberty to set up a "standard" of service, when the Act itself does not, and to proceed from such invented "standard" to condemn as unlawful whatever service they consider as departing from their standard of "normal" service. Railroads have always offered, without objection by the Commission, variable operating schedules or types of service for the same published tariff rates, and without publishing the schedules in tariffs. If, as the injunction requires, they are to be prevented from doing so they will be prohibited from adjusting their schedules and operations—both freight and passenger—to the requirements of sensible and economic operating requirements and to the varying needs and desires of the public. For example, the railroads would be compelled to transport "dead" freight (including lumber) in as fast service as that performed in transporting perishable California fruits and vegetables to the East in fast service to meet the needs of California producers and of eastern markets and consumers.

Moreover, whichever service counsel for the Commission, the Government or a district court might select as "normal" would amount to an automatic condemnation as unlawful all other services unless specified and offered in

published tariffs at an extra charge in addition to the rates for the selected "normal" service. No longer could transcontinental railroads provide at the same published tariff rates three different schedules or types of passenger train service between the East and the Pacific coast unless they made an extra charge for services other than the service selected by the Government or a court as "normal." Depending upon their judgment or whim, "normal" service could be either a fast, an intermediate or a slow service. Indeed, they attempt to support the decision below by citing *Chicago & Alton R. R. Co. v. Kirby,* 225 U. S. 155, in which slow service was treated as "normal" and special fast service for one shipper was condemned as unlawful.

There is no provision of law and no order, rule or regulation of the Commission expressly prohibiting railroads from offering and performing for all shippers, including lumber shippers, either a slow or a fast service for the same tariff rate, or requiring railroads to operate all of their trains or to move all traffic over their lines at the same speed or within the same running time; and there is no law or any order, rule or regulation by the Commission expressly requiring railroads to file with the Commission tariffs specifying operating schedules or the time within which they expect to move shipments over their lines; and there is no law or order, rule or regulation by the Commission requiring railroads to publish in tariffs and collect in addition to regular line-haul tariff charges any separate, additional or special charge for performing a slow or a fast service.

Neither appellant nor any other railroad has ever published in tariffs their operating time schedules or information concerning the type service offered or time consumed in transit for shipments moved at published tariff rates (see footnote 5, p. 14, *ante*). Although section 6(1)

of the Interstate Commerce Act requires railroads to publish their rates and charges for transportation between points on their lines "and all other charges which the Commission may require" and privileges or facilities which affect the aggregate of such rates and charges or the value of the service, the Act does not require and the Commission has no authority to require railroads to file tariffs specifying their operating schedules or to make an extra charge for a slow or a fast service, unless and until it finds after hearing upon evidence that the published rate is not reasonable or lawful for one or the other or both types of service. Indeed publication of such operating information in tariffs and the exaction of such extra charges for different types of service have never been required or suggested by the Commission in the entire 73 years of its existence until the present case. This is the first time in history that any contention has been made that a rate which is "reasonable" for a "normal" service automatically becomes unreasonably low, thus requiring an additional charge or a higher rate, for performance of a service that is either faster or slower than a so-called "normal" service.

None of the court decisions cited by the Government and the court below (discussed *infra,* pages 59-62), involved facts or circumstances comparable to those in the case at bar and none of them affords a basis or support for the decision below.

ARGUMENT

PREFATORY

It is appellant's position and contention that its offering and performing for all shippers at the same published tariff rate either a fast or slow service as elected by the shipper without tariff specification of operating schedule or time consumed in transit by either type service does not violate section 6(7) of the Interstate Commerce Act

or section 1 of the Elkins Act, but that whether its slow service does violate those acts raises questions that are not judicial but are questions of fact within the primary administrative jurisdiction of the Commission.

Appellant further contends that the problems raised by the Complaint herein, and attempted to be but not solved by the district court, are not susceptible to judicial solution, and certainly not by judicial process against this appellant alone, for the question whether a railroad violates the law in performing the two types of service without tariff publication for the same published tariff rates is not limited to appellant alone but is a question involving similar practices by all western railroads that compose direct routes which perform slow service in transporting lumber in their efforts to compete at equal rates with long circuitous routes, and even by some of the circuitous routes. See *Regulations for the Movement of Loaded Freight Cars*, 298 I.C.C. 371, 376.

As the injunction issued by the district court enjoins only the appellant, Union Pacific, from performing slow lumber service, its effect, if affirmed by this Court, is to exclude only Union Pacific direct routes from participating in the "roller" lumber traffic while the numerous other railroads forming other direct routes, not being bound by the injunction, would be free to continue performing the slow lumber service in their efforts to compete with the long circuitous routes. If the Government should bring suits for injunctions against each of the numerous other railroads in the several Federal district courts having jurisdiction over particular railroads, those courts, not being bound by the district court in the instant case, might well disagree with the district court below as to the legality of

the practices of other railroads that compete with this appellant for the "roller" lumber traffic, and the purpose of Congress to obtain uniformity in practices among railroads would fail, *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 439-441. And if, as would be quite unlikely, all of the district courts should agree with the court below and issue injunctions enjoining all of the railroads forming the direct routes from performing slow lumber service unless they exacted extra charges for it, then all of the "roller" lumber traffic would be lost to the direct routes, for, as occurred during the life of the Commission's Service Order No. 910, the "roller" lumber shippers would route their lumber traffic over the long circuitous but cheaper routes (R. 146).

Thus, as will be presently demonstrated, not only are the questions raised in this suit within the primary administrative jurisdiction of the Commission, but also the judiciary is helpless to resolve the whole problem, and the Commission is the one and only tribunal that might bring about the "desirable uniformity" in the application of interstate rates and in the practices of competing railroads which Congress intended to effectuate, *United States v. Western Pac. R. Co.*, 352 U. S. 59, 64.

Appellant submits that the Commission has dealt with the competing railroad routes, rates and service in the transportation of lumber from the Northwest in such "piecemeal" manner as to create chaos and confusion instead of the "desirable uniformity" which it is the function of such a specialized agency to effectuate. The Commission has, under section 13(2) of the Act, "full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing * * *

concerning which any question may arise under any of the provisions of this part, or relating to the enforcement of any of the provisions of this part * * * [and] to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had * * *." This Court said in *General American Tank Car Corp. v. El Dorado T. Co.*, 308 U. S. 422, at pages 432-433:

> "* * * The policy of the Act is that reasonable allowances and practices, which shall not offend against the prohibitions of the Elkins Act, are to be fixed and settled after full investigation by the Commission, and that there is remitted to the courts only the function of enforcing claims arising out of the failure to comply with the Commission's lawful orders."

Instead of conducting such "full investigation" to obtain the "desirable uniformity" among the numerous railroads by determining a fair, competitive relationship as to rates and service between the long circuitous routes and the shorter direct routes of this appellant and other participants in direct routes, the Commission has taken the following "piecemeal" steps:

1. By granting rate relief from section 4 of the Act for lumber traffic from the Northwest the Commission itself approved many of the long circuitous routes to compete at equal rates with the shorter direct routes, including the route of this appellant, *Commodity Rates on Lumber and Other Forest Products*, 151 I.C.C. 763; 165 I.C.C. 561.

2. Purporting to relieve an alleged freight-car shortage existing "in all sections of the country" the Commission, exercising its emergency car service powers under section 1(15) of the Act (App., p. 2), issued on March 19,

1956, its Service Order No. 910, which became effective June 13, 1956, prohibiting the railroads from wilfully delaying the movement of loaded freight cars for the purpose of increasing the time in transit (R. 65, 67). In a report dated April 13, 1956, entitled Service Order No. 910 — *Regulations for the Movement of Loaded Freight Cars*, 298 I.C.C. 371, it appears that the Service Order was aimed particularly at slow movement of "roller" lumber by numerous railroads. However, Service Order No. 910 was vacated by the Commission, effective December 8, 1956, manifestly because the emergency no longer existed in car supply. Appellant, of course, complied with the Service Order and lost gross revenues of more than $500,000 during the first month the order was effective because the "roller" lumber traffic was routed by shippers to the longer circuitous routes (R. 146).

3. After Service Order No. 910 was vacated appellant, and presumably all the other railroads that had previously performed slow service, reinstated its slow lumber service effective December 8, 1956 (R. 159), after which the Commission's agents obtained information from appellant's files concerning its slow lumber service, and the United States filed the Complaint herein December 23, 1957, alleging appellant's slow lumber service violated section 1 of the Elkins Act and section 6(7) of the Interstate Commerce Act in that, among other allegations, the slow service was performed "without charge and not pursuant to specific tariff provision" (R. 4), despite the fact, as the Commission well knew, that appellant charges, collects and retains the published tariff rates, and that no law, nor any order, rule or regulation by the Commission requires any extra charges for the slow service or any tariff provision offering to perform it.

4. After this suit was filed some six other railroads (not including this appellant) filed tariffs with the Commission proposing to hold "roller" lumber shipments at specified points en route 15 days free of demurrage. The Commission promptly suspended all of those tariffs, conducted hearings with respect to their lawfulness and issued its report dated July 31, 1959, entitled Investigation and Suspension Docket No. 7050, *Lumber—Free Time Allowance at Hold Points* (not yet officially reported), holding the tariffs to be unlawful and ordering that they be canceled.[6] But the Commission did not prohibit the railroads, whose tariffs it ordered canceled, from continuing to perform slow lumber service without tariff specification of the service or an extra charge for it. Instead of suggesting or ordering any solution to bring about uniformity between all of the direct routes and the circuitous routes, many of which it had previously approved, the Commission merely held that the proposed tariffs were not "just and reasonable," and said that the circuitous routes entailed "disabilities not encountered when the lumber is moved over a more direct route" and that railroads participating in circuitous routes were "not prohibited from restricting their rates so as to apply only over such routes as they consider to be reasonable." This latter, as the Commission well knew, the circuitous-route carriers would not do because it would lessen their ability to divert the "roller" traffic to their lines from the shorter direct routes.

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6 On January 7, 1960, the Commission released an order dated December 21, 1959, granting petitions for reopening and reconsideration of this proceeding on the present record, postponing the effective date of its previous order. Any final order the Commission makes upon reconsideration will be subject to independent judicial review, and it is thus entirely possible that it may issue an order which could render futile and useless any further consideration of the instant case by this Court.

5. Instead of exerting its administrative powers and conducting full investigation of the slow service of all competing railroads with a view to effectuating "desirable uniformity" in the competitive relations between the shorter direct routes and the long circuitous routes, including those previously approved by it, the Commission requested the Department of Justice to institute this suit (and a similar suit against the Northern Pacific Railway Company in the District of Minnesota) and has now obtained from the district court an injunction, the only effect of which, unless reversed by this Court, will be to completely exclude appellant from participation in the "roller" lumber traffic, while all other railroads would be free to perform slow service for that traffic. While the district court suggests that appellant may free itself of the injunction by having in force "a tariff lawfully on file with the Interstate Commerce Commission naming the rates and charges for such privileges or facilities" [slow service] (R. 225), certainly the exaction of extra charges in addition to the regular line-haul rates charged for the slow service would preclude appellant from participating in the "roller" lumber traffic while all of the numerous other railroads are free to perform slow service at regular tariff rates with no additional charge for that service.

The following language from this Court's decision in *U. S. v. Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, at pages 509-510, is appropriate here:

> "* * * The whole situation is subject to the power of the Commission, * * *. * * * Under § 15 of the statute the Commission of its own motion may conduct a comprehensive inquiry into the rates of all the lines within the area of controversy, may fix the fair relation between one line and another, * * *.

"• • • The reproach of piecemeal action is incurred by the Commission, which has not adjudged the fairness of the relation now subsisting between Illinois and Indiana rates, which has not questioned its own capacity to prevent unjust reprisals, which has put off to an indefinite future the remodeling of the rate structure *for all the carriers affected*, and which has *left this particular carrier helpless in the interval.* In brief, a schedule of lowered tariffs has been canceled though the facts that control the validity of the reduction have yet to be determined. *This was not a full discharge by the Commission of an immediate responsibility.* It was inaction and postponement. Responsibility was shifted from the shoulders of the present to the shoulders of the days to come." (Italics added.)

I.

THE COMPLAINT PRESENTS BASIC PRELIMINARY QUESTIONS OF FACT WHICH ARE WITHIN THE EXCLUSIVE PRIMARY ADMINISTRATIVE JURISDICTION OF THE INTERSTATE COMMERCE COMMISSION, AND THE DISTRICT COURT ERRED IN REFUSING TO DISMISS IT.

The Complaint presents basic preliminary questions of fact which are clearly within the exclusive primary jurisdiction of the Commission and its determination of those facts is prerequisite to a decision of the ultimate question presented by the Complaint, namely, whether appellant's offering and performing two types of service (i.e., a fast service and a slow service) for all shippers alike and for the same published tariff rates, without describing or specifying the slow service in the published tariffs and without making an extra charge for it, renders the slow service, *ipso facto*, a violation of section 6(7) of the Interstate Commerce Act and section 1 of the Elkins Act.

The ultimate allegation in the Complaint that appellant's slow service is unlawful is a mere conclusion of the lawyers who wrote the Complaint drawn from their basic

allegations that appellant's slow service is a device whereby "advantages" are given and "discriminations are practiced"; that the slow service without tariff publication is an unlawful extension of "privileges and facilities"; that the slow service contributes "trackage and cars to provide a storage facility" and results in "freight car shortages," in "additional need for power and working crews," in "excessive per diem cost" to appellant to the "economic disfavor" of appellant and "detriment of the national policy to maintain economically stable transportation facilities," and to give "advantages" to certain shippers, placing them in "a superior competitive position in the marketing of lumber." Appellant's answer denies those allegations (R. 18-19); and whether they are true or false depends upon findings of fact derived from evidence setting forth detailed and probative facts in particularity.

Thus, the basic and fundamental preliminary administrative questions are —

1. whether the published tariff rates admittedly collected and retained by appellant are "just and reasonable" for both the fast and the slow service performed by appellant, and that is a question of fact for the Commission's determination under section 1(5) of the Act;

2. whether appellant's performance of both services at the same published tariff rates and charges is a just and reasonable "practice," and that is a question of fact for the Commission's decision under sections 1(6) and 15(1) of the Act;

3. whether, in performing both fast service and slow service for all shippers alike at their request, for the same

published tariff rates and charges, appellant may be deemed guilty of "unjust discrimination," and that is a question of fact for the Commission's decision under section 2 of the Act;

4. whether performance of both fast and slow services for all shippers alike for the same published tariff rates and charges causes an "undue or unreasonable preference or advantage" or any "undue or unreasonable prejudice or disadvantage," and that is a question of fact for the Commission's decision under section 3 of the Act;

5. whether the slow service at published tariff rates for all shippers alike, but without description of the service in the published tariffs, in fact, constitutes "privileges" not specified in the tariffs within the prohibition of section 6(7) of the Act, and that is a question of fact for the Commission's decision under section 6(1) of the Act, which requires railroads to publish "all other charges which the Commission may require."

Determination of the foregoing questions is so plainly within the Commission's exclusive primary administrative jurisdiction as to make clear the duty of the district court to dismiss the Complaint and remand the case to the Commission; and, being informed that the practice of performing both a slow service and a fast service in transporting lumber at the same published tariff rates without tariff specification of either type service was not confined to this appellant alone, but was engaged in by practically all of the numerous western railroads forming the direct routes, the district court, *a fortiori,* should have dismissed the Complaint and remanded the case to the Commission to determine the administrative questions not alone with re-

spect to this appellant, but to order a full investigation and hearing of the entire subject and make determinations covering all of the railroads engaged in the same practice and to make such findings, decision and order, if any it deems necessary, to make effective "the desirable uniformity which would obtain if initially a specialized agency passed on certain types of administrative questions," *United States v. Western Pac. R. Co.*, 352 U. S. 59, 64. Since any order, rule or regulation issued or promulgated by the Commission as a result of such full investigation would be subject to independent judicial review by a specially constituted three-judge Federal court, pursuant to special statutory procedure prescribed in 28 U.S.C.A., §§ 1336, 1398, 2284, and 2321-2325, thus rendering any further court proceedings in this case futile and useless, decisions of this Court presently to be cited and discussed, clearly required the district court to dismiss the Complaint.

The situation here is practically identical to that in *U. S. Nav. Co. v. Cunard S. S. Co.*, 284 U. S. 474, in which the Complaint, brought to enjoin alleged violations of the antitrust laws, was dismissed on the ground that the matters complained of were within the exclusive administrative jurisdiction of the United States Shipping Board, under the Shipping Act of 1916. In that case a group of steamship lines by agreement among them charged a low rate to shippers who agreed to ship all of their traffic via the lines of the group but charged the regular and twice higher tariff rate to shippers who would not agree to ship all their traffic via the lines of the group. This and other concerted activities of the group were alleged to be in violation of the antitrust laws. Significantly, the carriers in that case charged two types of rates (low contract and high tariff) for the same service, while in the case at bar ap-

pellant charges one and the same rate for two types of (slow and fast) service. At page 480 this Court said:

> "It may be conceded that, looking alone to the Sherman Antitrust Act, the bill states a cause of action under §§ 1 and 2 of that act, and, consequently furnishes ground for an injunction under § 16 of the Clayton Act, unless the Shipping Act stands in the way; and this was the view of both courts below."

And at page 485 the Court held:

> "The act is restrictive in its operation upon some of the activities of common carriers by water, and permissive in respect of others. Their business involves questions of an exceptional character, the solution of which may call for the exercise of a high degree of expert and technical knowledge. Whether a given agreement among such carriers should be held to contravene the act may depend upon a consideration of economic relations, of facts peculiar to the business or its history, of competitive conditions in respect of shipping of foreign countries, and of other relevant circumstances, generally unfamiliar to a judicial tribunal, but well understood by an administrative body especially trained and experienced in the intricate and technical facts and usages of the shipping trade; and with which that body, consequently, is better able to deal. Compare *Chicago Board of Trade v. United States,* 246 U. S. 231, 238; *United States v. Hamburg-American S. S. Line,* 216 Fed. 971.
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> "A comparison of the enumeration of wrongs charged in the bill with the provisions of the sections of the Shipping Act above outlined conclusively shows, without going into detail, that the allegations either constitute direct and basic charges of violations of these provisions or are so interrelated with such charges as to be in effect a component part of them; *and the remedy is that afforded by the Shipping Act, which to that extent supersedes the antitrust laws.*

> Compare *Keogh v. Chicago & N. W. Ry. Co., supra* [260 U. S. 156], at p. 162. The matter, therefore, is within the exclusive preliminary jurisdiction of the Shipping Board. The scope and evident purpose of the Shipping Act, as in the case of the Interstate Commerce Act, are demonstrative of this conclusion. * * *." (Italics added.)

As already stated, whether appellant's slow service is an "advantage," or a "discrimination," a "privilege" or "facility," are questions of fact, *Nashville Ry. v. Tennessee,* 262 U. S. 318, 322, and this Court has consistently held that the very purpose of the Congress in creating the Commission was to place the exclusive duty of deciding those facts in one Federal administrative tribunal having particular knowledge of complicated technical aspects of the regulation of railroad transportation. *Texas & Pac. Ry. v. Abilene Cotton Oil Co.,* 204 U. S. 426, 444.

In *United States v. Trucking Co.,* 310 U. S. 344, at pages 352-353, this Court held:

> "'It is not disputable that from the beginning the very purpose for which the Commission was created was to bring into existence a body which from its peculiar character would be most fitted to primarily decide whether from facts, disputed or undisputed, in a given case preference or discrimination existed' [citing *United States v. Louisville & Nashville R. Co.,* 235 U. S. 314, 320]. * * * The Interstate Commerce Act does not attempt to define an unlawful discrimination with mathematical precision. Instead, different treatment for similar transportation services is made an unlawful discrimination when 'undue,' 'unjust,' 'unfair,' and 'unreasonable.' *And the courts have always recognized that Congress intended to commit to the Commission the determination, by application of an informed judgment to existing facts, of the existence*

of forbidden preferences, advantages and discrimination." (Italics added.)

As neither the Interstate Commerce Act nor the Elkins Act expressly prohibits or condemns as unlawful the performance of either a slow service or a fast service for the same rate or charge, and since appellant admittedly collects and retains the full published tariff rate for both types of service, its slow service may *not*, like a "rebate" [which both Acts expressly prohibit], be condemned as "a thing *ipso facto* illegal and prohibited by the statute," *Mitchell Coal Co. v. Penna. R. R. Co.*, 230 U. S. 247, 261; and, since the "legal quality" of the slow service has not—like a rebate or refund to a shipper of a part of the tariff rate—been "definitely fixed by the statute," so, performance of the slow service, "otherwise permissible, is lawful or unlawful, according as it is reasonable or unreasonable" (Id., page 255), or, in fact, brings about a "discrimination," "advantage" or some other result prohibited by the Act.

> "* * * But to determine that question involves a consideration and comparison of many and various facts and calls for the exercise of the discretion of the rate-regulating tribunal. *The courts have not been given jurisdiction to fix rates or practices in direct proceedings, nor can they do so collaterally during the progress of a lawsuit when the action is based on the claim that unreasonable allowances have been paid.* If the decision of such questions was committed to different courts with different juries the results would not only vary in degree, but might often be opposite in character—to the destruction of the uniformity in rate and practice which was the cardinal object of the statute." (Id., 230 U. S. 255.) (Italics added.)

It has been the settled rule of this Court for more than 50 years that it is not the duty or function of the courts

to decide disputed questions that are "peculiarly within the province of the Commission," and that when such questions arise in court proceedings, it is the duty of the courts, "to remand the case to the Commission to enable it to perform that duty," *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 444 (1907).

The rule was restated and applied and its basis explained in the *Cunard* case, *supra*, which, as we have shown, involved the interplay between court and administrative agency functioning under the antitrust laws, on the one hand, and the Shipping Act of 1916, on the other hand. At pages 480-481 the Court said:

> "The Shipping Act is a comprehensive measure bearing a relation to common carriers by water substantially the same as that borne by the Interstate Commerce Act to interstate common carriers by land. When the Shipping Act was passed, the Interstate Commerce Act had been in force in its original form or in amended forms for more than a generation. Its provisions had been applied to a great variety of situations, and had been judicially construed in a large number and variety of cases. *The rule had become settled that questions essentially of fact and those involving the exercise of administrative discretion, which were within the jurisdiction of the Interstate Commerce Commission, were primarily within its exclusive jurisdiction, and, with certain exceptions not applicable here, that a remedy must be sought from the Commission before the jurisdiction of the courts could be invoked.* In this situation the Shipping Act was passed. In its general scope and purpose, as well as in its terms, that act closely parallels the Interstate Commerce Act; and we cannot escape the conclusion that Congress intended that the two acts, each in its own field, should have like interpretation, application and effect. * * *." (Italics added.)

Explaining the reason for the rule, the Court further said at page 482:

> "* * * In all such cases the uniformity which it is the purpose of the Commerce Act to secure could not be obtained without a preliminary determination by the commission. Preliminary resort to the commission 'is required because the enquiry is essentially one of fact and of discretion in technicial matters; and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts. * * *.'"

The Court, then, at page 483, cited the following cases and circumstances in which it had applied the rule:

> "So the rule has been applied where recovery was sought by a shipper for unreasonable and excessive freight rates not found to be unreasonable by the Commission, *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426; where the question was as to the reasonableness of the carrier's practice in distributing cars, *Midland Valley R. Co. v. Barkley*, 276 U. S. 482; where the reasonableness of a particular practice of routing was involved, *Northern Pacific Ry. Co. v. Solum*, 247 U. S. 477, 483; where the continuance of service on an industrial track was assailed as unduly discriminatory, *Western & Atlantic R. Co. v. Public Service Comm.*, 267 U. S. 493, 497, and where an action was brought under § 7 of the Antitrust Act, based upon an alleged conspiracy among carriers to fix rates, *Keogh v. Chicago & N. W. Ry. Co.*, 260 U. S. 156. In the case last cited, it was pointed out (p. 163) that if a shipper were permitted to recover under the Antitrust Act, the amount recovered might, like a rebate, operate to give him a preference over his trade competitors. 'Uniform treatment would not result, even

> if all sued, unless the highly improbable happened, and the several juries and courts gave to each the same measure of relief.'"

The rule thus stated and explained has been reiterated in a long and undeviating line of this Court's decisions.[7]

It is a compelling fact that one of the cases, *Northern Pacific Ry. Co. v. Solum*, 247 U. S. 477, cited by the Court in the language last quoted, involved a question identical to one of the questions the Complaint here asked the district court to decide, namely, whether appellant's use of the longer of its two lines into Council Bluffs is unlawful (see Complaint, paragraph "4", R. 3).

In the *Solum* case the Northern Pacific had *two* lines between the same points, namely, an intrastate line over which a lower coal rate applied, and an interstate line over which a higher rate applied. For economical operation the Northern Pacific moved outbound shipments from Duluth over the interstate line and collected the higher rate. Solum sued in a state court for the difference between the higher interstate rate collected and the lower rate applicable over the intrastate line. At page 481, this Court observed:

> "* * * The objection that the court lacked jurisdiction to entertain the proceeding was not made in the answers in the trial court; but it was insisted upon before the Supreme Court of Minnesota; was considered and overruled by that court (133 Minnesota, 93, 97); and is available here."

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7 See *Manufacturers Ry. Co. v. United States*, 246 U.S. 457, 481; *Pennsylvania Co. v. United States*, 236 U.S. 351; *Seaboard Air Line Ry. Co. v. United States*, 254 U.S. 57, 62; *Penna. R.R. Co. v. International Coal Co.*, 230 U.S. 184, 196; *Mitchell Coal Co. v. Penna. R. R. Co.*, 230 U.S. 247, 255, *Nashville Ry. v. Tennessee*, 262 U.S. 318, 322; *Los Angeles Switching Case*, 234 U.S. 294, 311; *Board of Trade v. United States*, 314 U.S. 534, 546; *General American Tank Car Corp. v. El Dorado T. Co.*, 308 U.S. 422, 432-433; *El Dorado Oil Works v. U.S.*, 328 U.S. 12, 17; *United States v. Western Pac. R. Co.*, 352 U.S. 59, 62-70.

At pages 482-483 the Court held:

"* * * Whether the practice of the carrier of shipping over the interstate route was reasonable, when a lower intrastate route was open to it, presents an administrative question, one of perhaps considerable complexity.

"The Railway contends that, since the administrative question upon which its liability depends involves the reasonableness of a practice in interstate commerce and the traffic actually moved in interstate commerce, the court had no jurisdiction to adjudicate the controversy until that administrative question had been determined by the Interstate Commerce Commission. The shipper, on the other hand, urges that the rule which requires such preliminary determination of administrative questions by the Commission applies only to those cases where the question involved is whether a particular rate is unreasonable or whether a particular practice is discriminatory. But the rule is not so limited. It applies, likewise, to any practice of the carrier which gives rise to the application of a rate. *Texas & Pacific Ry. Co. v. American Tie & Timber Co.*, 234 U. S. 138, 147; *Pennsylvania R. R. Co. v. Puritan Coal Co.*, 237 U. S. 121, 131; *Pennsylvania R. R. Co. v. Clark Brothers Coal Mining Co.*, 238 U. S. 456, 469. * * *."

Sustaining the Northern Pacific's jurisdictional contention, the Court, at page 484, applied—

"* * * the rule, that the courts may not be resorted to until the administrative question has been determined by the Commission. * * *."

In *Director General v. Viscose Co.*, 254 U. S. 498, the Director of Railroads published and filed with the Commission a tariff supplement proposing to cancel on 30 days' notice the classification and freight rate on artificial silk so as to include it among articles that would *not* be

accepted for shipment. Before the supplement became effective, Viscose obtained from a United States District Court an injunction restraining the Director from putting the supplement into effect refusing to accept artificial silk for shipment. On appeal, the Circuit Court of Appeals certified to this Court the question:

> "'Did the District Court have jurisdiction to decide the matter raised by the complainant's bill and thereupon to annul the said action of the Director General of Railroads and enjoin the carriers from complying therewith?'"

Holding, at page 503, that the facts "presented a question for decision within the exclusive initial jurisdiction of the Interstate Commerce Commission," this Court concluded that the District Court was without jurisdiction, saying, at page 504:

> "The importance to the commerce of the country of the exclusive, intial jurisdiction which Congress has committed to the Interstate Commerce Commission need not be repeated and cannot be overstated (*Texas & Pacific R. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426; *Baltimore & Ohio R. R. Co. v. Pitcairn Coal Co.*, 215 U. S. 481; *Morrisdale Coal Co. v. Pennsylvania R. R. Co.*, 230 U. S. 304; *Minnesota Rate Cases*, 230 U. S. 352; *Texas & Pacific Ry. Co. v. American Tie Co.*, 234 U. S. 138, 146; *Pennsylvania R. R. Co. v. Clark Coal Co.*, 238 U. S. 456, 469, and *Loomis v. Lehigh Valley R. R. Co.*, 240 U. S. 43, 49), and, concluding, as we do, that this case falls plainly within that jurisdiction, the question asked by the Circuit Court of Appeals must be answered in the negative.
>
> "*Question answered*, No."

The rule requiring dismissal of the instant case was succinctly stated and again applied by this Court in its

recent (1952) decision in *Far East Conf. v. United States,* 342 U. S. 570, upon facts and circumstances which make that decision a perfect and compelling authority for dismissal of the Complaint in the case at bar. In that case, as in the *Cunard* case, *supra,* a group of steamship lines maintained by agreement among themselves a "dual-rate" system, namely, a low rate for shippers who agreed to use ships of the Conference members exclusively, and a higher rate for shippers who did not agree to such exclusive patronage. There, as in the *Cunard* case, *supra,* the carriers charged two different rates for one and the same service, while in the case at bar appellant performs either of two types of service (slow or fast) for one and the same rate.

The United States sued to enjoin the "dual-rate" system on the ground that it violated the Sherman Antitrust law [26 Stat. L. 209]. The defendants moved to dismiss the complaint—

> "* * * on the ground that the nature of the issues required that resort must first be had to the Federal Maritime Board before a District Court could adjudicate the Government's complaint. * * *." (Page 572.)

The District Court denied the motion to dismiss. This Court granted certiorari and reversed.

Citing the *Cunard* case, *supra,* the Court said, page 573: "That case answers our problem," and after quoting from the decision in that case, the Court said, at pages 574-575:

> "The Court thus applied a principle, now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion,

agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a basis for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.

"It is significant that this mode of accommodating the complementary roles of courts and administrative agencies in the enforcement of law was originally applied in a situation where the face of the statute gave the Interstate Commerce Commission and the courts concurrent jurisdiction. * * *."

At page 576, the Court said:

"The sole distinction between the *Cunard* case and this is that there a private shipper invoked the Antitrust Acts and here it is the Government. This difference does not touch the factors that determined the *Cunard* case. The same considerations of administrative expertise apply, whoever initiates the action. The same Antitrust Laws and the same Shipping Act apply to the same dual-rate system. To the same extent they define the appropriate orbits of action as between court and Maritime Board."

Pointing out that the order of the Board upon its consideration and decision of the question whether the "dual-rate" system was unlawful would be subject to special judicial review, the Court held that the complaint should be dismissed, explaining at pages 576-577:

"Having concluded that intial submission to the Federal Maritime Board is required, we may either order the case retained on the District Court docket pending the Board's action, *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U. S. 422, 432-433; *El Dorado Oil Works v. United States*, 328 U. S. 12, 17; see *United States v. Interstate Commerce Commission, supra* [337 U. S. 426], at 465, n. 12, or order dismissal of the proceeding brought in the District Court. As distinguished from the situation presented by the first *El Dorado* case, *supra*, which was a contract action raising only incidentally a question proper for initial administrative decision, the present case involves questions within the general scope of the Maritime Board's jurisdiction. Shipping Act of 1916, §§ 14, 15, 39 Stat. 728, 733, 46 U. S. C. §§ 812, 814. An order of the Board will be subject to review by a United States Court of Appeals, with opportunity for further review in this Court on writ of certiorari. Pub. L. No. 901, 81st Cong., 2d Sess., §§ 2, 10, 64 Stat. 1129, 1132. If the Board's order is favorable to the United States, it can be enforced by process of the District Court on the Attorney General's application. 39 Stat. 728, 737, 46 U. S. C. § 828. We believe that no purpose will here be served to hold the present action in abeyance in the District Court while the proceeding before the Board and subsequent judicial review or enforcement of its order are being pursued. A similar suit is easily initiated later, if appropriate. Business-like procedure counsels that the Government's complaint should now be dismissed, as was the complaint in *United States Navigation Co. v. Cunard Steamship Co., supra*."[8]

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8 This Court's decision, May 19, 1958, in *Maritime Board v. Isbrandtsen Co.*, 356 U.S. 481, does not impair but is fully consistent with the decisions and disposition of the *Cunard* and *Far East Conference* cases. Indeed, at page 496, the Court said, "[a] reading of those opinions immediately refutes any suggestion either that this issue was expressly decided in those cases or that our holding here is not fully consistent with the disposition of those cases."

The most recent application by this Court of the rule which requires dismissal of the case at bar was in *Boston & Maine Railroad v. U. S.*, 358 U. S. 68, decided Nov. 17, 1958. There, the Interstate Commerce Commission had issued a declaratory order that rates of *per diem* charged by long-line railroads for use of their freight cars were "not in excess of reasonable compensation." In a suit to enjoin the order a three-judge district court held that the Commission should give more thorough consideration to "a mileage factor" in determining whether the car *per diem* was reasonable, and set aside the order. After an appeal was filed in this Court the Commission filed a memorandum with the Court expressing its readiness to proceed with further consideration in accordance with the district court's suggestion. In dismissing the appeal the Court explained at pages 71-72:

> "* * * As a result, we find the question raised by No. 310—whether the Commission has adjudicatory jurisdiction to determine a rate of uniform application throughout the industry or must engage in what the District Court characterized as the 'full scale investigation' accompanying promulgation of a rule under § 1(14)(a)—prematurely presented for decision. The Commission here recognizes that 'further investigation' and 'more detailed findings' will be requisite to compliance with the District Court's remand. Should such proceeding lead the Commission to reconsider its estimate of the desirability of a *per diem* embracing a mileage factor, the result might well be not a declaration that the present *per diem* is just and reasonable but the establishment of a new rate. If, conversely, the Commission adheres to its original view, it will be in the light of new findings derived from its further investigation. In either event, the proceedings on remand may lose the characteristics of a § 5(d) declaration and take on those of a § 1(14)(a) rule-making

procedure, thereby causing the question now sought to be reviewed to disappear. As the Commission has appropriately observed, the record now presents what is essentially only 'an interim ruling.'

"These considerations lead us to dismiss the appeal in No. 310 without prejudice to raising the 'adjudicatory' issue again, if it survives the further Commission proceedings. This also disposes of No. 322, which is a cross appeal by the long-haul roads challenging the scope of the District Court's review.

"*It is so ordered.*"

In that case and in the *Far East Conference* case, the Court proceedings were ended by dismissal because the further administrative proceedings would result in orders by the Commission and the Board, respectively, which orders would be subject to special judicial review, thus rendering further proceedings by the Court in the cases before it futile and useless. Likewise, in the case at bar, as we have already pointed out, the Commission's investigation upon remand will result in a decision, order, rule or regulation, if any be deemed necessary, by the Commission, which will also be subject to special judicial review, thus rendering further court proceedings in the case at bar futile and useless.

In the circumstances we submit that this Court should reverse the district court and remand the case to it with directions to dismiss the Complaint, and to remand the matter to the Commission for full investigation and hearings concerning the practices of all railroads performing both a fast and a slow service in transporting lumber at the same tariff rates without specification in published tariffs of either type service or an extra charge in addition to the published tariff rates.

The district court's decision and the Government's Motion to Affirm attempt upon three grounds to justify the court's refusal to dismiss the Complaint and to remand the matter to the Commission for full investigation and resolution of the administrative questions involved.

First, the Motion to Affirm at pages 12-13 argues that instead of usurping the Commission's administrative jurisdiction the decree below aids that jurisdiction by directing appellant to comply with the tariff already on file with the Commission and by enjoining appellant from offering slow services until it files another tariff specifically offering slow service and naming rates and charges for it so as to give the Commission an opportunity to pass upon its lawfulness. But the court clearly did not issue the injunction merely to enable the Commission to investigate the lawfulness of appellant's slow service. The Commission already had that power and duty, upon its own initiative, under sections 13(2) and 15(1) of the Interstate Commerce Act. Therefore, in the face of the Commission's plenary powers of investigation, it is idle for the Government to argue that the Commission requested that this suit be brought to have the court require appellant to invoke the primary jurisdiction of the Commission by filing a tariff providing for the challenged service. Instead of remanding the case to the Commission, the district court proceeded to make its own administrative findings that the slow service results in an "advantage" to shippers using it and "discrimination" against shippers who do not desire or use the slow service, and that the service constitutes "privileges or facilities" not specified in the published tariffs. On these administrative findings of fact the district court made conclusions of law (R. 219-222) condemning the slow service as violating section 1 of the Elkins Act and section 6(7) of the Inter-

state Commerce Act, and the decree enjoins the asserted violations.

Thus, despite the district court's recognition that it is the Commission's function to determine whether appellant's slow service is "reasonable," and the court's denial that its decision holds the service to be "unreasonable" (R. 219), the court clearly usurped the Commission's administrative function by making its own determination of the "legal quality" of the slow service, holding it to be unlawful and, by paragraph 1 of the injunction (R. 224), enjoining appellant from performing it. The very basis of the injunction necessarily lies in the court's own findings of fact, in effect, that appellant may not lawfully offer and perform for all shippers at their election either of two types of service (fast or slow) for the same published tariff rate. That determination and other questions embraced in it, namely, whether the tariff rate is a reasonable rate for both the fast and slow service and whether the service results in unlawful advantage to shippers electing it and in discriminations against shippers who do not desire the slow service, are matters clearly within the exclusive primary jurisdiction of the Commission. Appellant contends that it may lawfully perform either a fast or a slow service for the one rate named in its published tariffs on file with the Commission and that no law requires appellant to specify in its tariffs either the fast or the slow service, but that if the Commission believes otherwise it may, upon its own motion, conduct a full investigation, hearings and orders under the powers conferred by section 13(2) of the Act without the futile circumlocution of asking the Government to bring this suit for the purpose of having the district court order appellant to invoke the Commission's primary jurisdiction.

Second, the district court and the Government's Motion to Affirm assert that the rule of primary jurisdiction is not applicable in this case because the Elkins Act expressly empowers the courts to issue injunctions. But decisions of this Court hold that mere existence of such power in the courts is no excuse for their refusal to dismiss a case or to stay their hands and remand a case to the Commission which was especially created by Congress to determine whether rates, rules or practices of railroads result in unlawful advantages, discriminations or other prohibited results.

In *U. S. Nav. Co. v. Cunard S. S. Co.*, 284 U. S. 474, this Court affirmed the decree of the court of appeals (50 F. (2d) 83) which had affirmed a decree of the district court granting a motion to dismiss the complaint (39 F. (2d) 204). The dismissal was ordered on the ground that the matters set forth in the complaint, though stating a cause of action and furnishing ground for an injunction authorized by the antitrust laws, were also within the exclusive administrative jurisdiction of the United States Shipping Board under the Shipping Act of 1916. At page 480 the Court said —

> "It may be conceded that looking alone to the Sherman Antitrust Act, the bill states a cause of action under §§ 1 and 2 of that act, and, consequently, furnishes ground for an injunction under § 16 of the Clayton Act, unless the Shipping Act stands in the way; and this was the view of both courts below."

Far East Conf. v. United States, 342 U. S. 570, was a suit brought by the Government to enjoin alleged violations of the antitrust laws. But this Court again ordered dismissal on the ground that the subject matter was within

the administrative jurisdiction of the Federal Maritime Board, to which preliminary resort was required. Thus, application of the rule of primary jurisdiction depends not upon whether the courts have power to issue an injunction, but upon the question whether the facts alleged present problems primarily within the jurisdiction of an agency especially created to make administrative determinations in a particular field.

At page 577 (see quotation, *infra*, page 37) this Court said—

> "* * * Business-like procedure counsels that the Government's complaint should now be dismissed, as was the complaint in *United States Navigation Co. v. Cunard Steamship Co., supra.*"

The similarity between the facts and circumstances in the instant case and the decisions and disposition by this Court of the *Cunard* and *Far East* cases is of compelling significance. In both of those cases the Court, though clearly having injunctive power, ordered the complaints dismissed, applied the rule of primary jurisdiction and refused to enjoin the steamship lines from charging two different rates for one type of transportation service, while in the instant case the district court refused to apply the rule of primary jurisdiction and enjoined appellant from performing two types of transportation service for one and the same rate. The Court's decisions in those cases clearly required the district court to dismiss the complaint in the instant case and remand the case to the Commission.

Concerning the applicability of the doctrine of primary administrative jurisdiction, the following test is stated in 3 Davis, Administrative Law Treatise, § 19.07, p. 39:

> "* * * The test is not whether some parts of the case are within the exclusive jurisdiction of the courts; the test is whether some parts of the case are within the exclusive jurisdiction of the agency. * * *."

Third, the decision below (R. 210) and the Motion to Affirm, pages 14-15, argue that the rule of primary jurisdiction is not applicable here because the Commission has "clarified" its views concerning "intentional delays of shipment to suit a shipper's needs." While the cases cited in support of that contention contain general language which, in its context, indicated that the Commission is generally opposed to such delays because it thinks they are not in the public interest or contribute to car shortages, none of the cases involved investigations, hearings, adjudications or determinations by the Commission of the administrative questions squarely presented and calling for decision by the Commission in this case. Certainly none of the cited cases constitutes a decision or a clarification of the question whether, for its own competitive needs as well as shippers' needs, this appellant's performance of two types of service for one published tariff rate, open to all shippers at their election, violates any provision of the Interstate Commerce Act or Elkins Act, or whether the published tariff rate is a reasonable rate for both fast and slow service, or results in unlawful advantages or discriminations.

A similar effort to prevent dismissal of the complaint and circumvent application of the rule of primary jurisdiction was made in the *Cunard* case and was rejected by both the court of appeals (50 F. (2d) 83, 90-91) and by this Court (284 U. S. 474) which said at pages 487-488—

> "Petitioner contends that the Shipping Board has already determined that an agreement similar to the

one here involved is unlawful under the Shipping Act, *Eden Mining Co. v. Bluefields Fruit & S. S. Co.*, 1 U.S.S.B. 41, and, therefore, that the courts may take jurisdiction of the case without further preliminary resort to the board. In support of this contention we are referred to *Mitchell Coal Co. v. Pennsylvania R. Co. supra* [230 U. S. 247], (see p. 257), and *National Pole Co. v. Chicago & N. W. Ry Co.*, 211 Fed. 65, 72. Without stopping to consider the general principle thus invoked, it is enough to say that the *Eden* case did not involve this agreement or these parties, * * *."

As we have just pointed out, none of the cases relied upon in the Motion to Affirm and by the court below to escape dismissal of the complaint and application of the rule of primary jurisdiction involved facts or circumstances at all comparable to those in the instant case, nor do they support or justify the district court's usurpation of administrative functions to decide whether, in order to compete with the long circuitous routes, many of which the Commission itself approved, appellant and other railroads forming shorter direct routes may perform a slow service for the same rate they charge for their fast service, or whether the rates charged are "reasonable" rates for both the fast and slow service or whether the performance of both services for the same rate, without specifying either service in published tariffs, results in any unlawful advantage or any forbidden discrimination. These basic questions and others already mentioned are clearly within the Commission's exclusive primary administrative jurisdiction.

This Court should direct the district court to dismiss the Complaint and remand the case to the Commission with directions to investigate the practices of all railroads, including the circuitous routes as well as the direct routes,

with a view to effectuating desirable uniformity and fair competitive relations among all railroads participating in the "roller" lumber traffic.

II.

APPELLANT'S PERFORMANCE FOR ALL SHIPPERS AT THE SAME PUBLISHED TARIFF RATE OF EITHER A FAST OR A SLOW SERVICE AS ELECTED BY THE SHIPPER, WITHOUT TARIFF SPECIFICATION OF OPERATING SCHEDULE OR TIME CONSUMED IN TRANSIT BY EITHER TYPE OF SERVICE, AND WITHOUT EXTRA CHARGE FOR THE SLOW SERVICE, DOES NOT VIOLATE SECTION 6(7) OF THE INTERSTATE COMMERCE ACT OR SECTION 1 OF THE ELKINS ACT.

The Government's case and the decision below are bottomed on the postulate that railroads can not lawfully perform two types of service—fast or slow—for the same published tariff rate.

No provision of law nor any order, rule or regulation of the Commission is cited as the basis for that postulate, and there is none. Instead, it is reached by the following sheer assertions:

a. That "it is necessarily implicit in the tariffs that the rates apply to the carrier's 'normal' service" (Motion to Affirm, p. 7).

b. That appellant's fast service is its "normal" service and is, therefore, the only service or the quantum of service that may lawfully be furnished for the published tariff rates.

c. That, therefore, slow service and any service other than the fast or "normal" service is a "special service" and may not be lawfully performed for the published tariff rates.

d. That, although "regular operating time schedules are not required to be filed" specifying or offering fast or "normal" service, no service other than the fast or "normal" service may be lawfully performed

unless it is specified or offered in published tariffs on file with the Commission naming an extra charge in addition to the published tariff rates for such "special service."

Neither appellant nor any other railroad has ever published in tariffs their operating time schedules or information concerning the type service offered or time consumed in transit for shipments moved at published tariff rates. Such information is furnished shippers by the traffic and operating departments of railroads from information circulars similar to the familiar railroad passenger "timetables" (*Infra*, page 14, footnote 5).

There is no provision of law and no order, rule or regulation of the Commission expressly prohibiting railroads from offering and performing for all shippers, including lumber shippers, either a slow or a fast service for the same tariff rate, or requiring railroads to operate all of their trains and to move all traffic over their lines at the same speed or within the same runing time; and there is no law or any order, rule or regulation by the Commission requiring railroads to file with the Commission tariffs specifying the running times or schedules of their trains or the time within which they expect to move shipments over their lines; and there is no law or order, rule or regulation by the Commission requiring railroads to publish in tariffs and collect, in addition to the regular line-haul tariff charges, any separate, additional or special charges for performing a slow or a fast service. Indeed, publication of such operating information in tariffs and the exaction of such extra charges have never been required or suggested by the Commission in the entire 73 years of its existence, until the present case.

The Complaint alleges (R. 5-6) and the district court finds (R. 201-202) that appellant's slow service without tariff publication and an extra charge is an unlawful extension of "privileges and facilities"; that the slow service contributes "trackage and cars to provide a storage facility" and results in "freight car shortages," in "additional need for power and working crews," in "excessive per diem cost" to appellant to the "economic disfavor" of appellant and "detriment of the national policy to maintain economically stable transportation facilities," and to give "advantages" to certain shippers, placing them in "a superior competitive position in the marketing of lumber." Appellant's answer denies those allegations; and whether they are true or false depends upon findings of fact derived from evidence setting forth detailed and probative facts in particularity.

Section 1(3)(a) of the Interstate Commerce Act defines the term "railroad" and also defines the term "transportation" as including locomotives, cars and "all instrumentalities and facilities of shipment or carriage," and section 1(4) makes it the duty of every common carrier subject thereto "to provide and furnish transportation upon reasonable request therefor, * * *." (App., p. 1.)

A railroad's compensation for providing the tracks, cars, locomotives and other facilities used in moving a shipper's goods from place to place and for the actual movement of them is obtained through complying with section 6(1) of the Act which requires railroads to file and publish tariffs showing "all the rates, fares and charges for transportation" between points on its own route and between points on its route and points on the routes of other railroads. (App., p. 3.)

In other words, the "rates, fares. and charges," which railroads are required to publish in tariffs and collect from shippers, are for *transporting* the shippers' goods, by means and through the use of the railroads' tracks, cars, locomotives and other facilities, from place to place, and performance of kindred service in connection with such movement.

The Act does not require railroads to publish in tariffs separate or additional rates or charges for the use of their *tracks, locomotives, cars* or other facilities used in performing the "transportation" which railroads are required to furnish.

Nor does the Act require railroads to publish tariffs showing the schedules or "runing time" of their trains, or to "hold out," promise or obligate themselves, through tariff publication or otherwise, to move goods or passengers between places within any particular or specified time, or to move all of their trains at the same speed or within the same "running time" or upon the same schedule; or to publish tariffs naming a special, additional or different charge for running one train, or moving one shipment faster or slower than another.

Although properly admitting that operating time schedules are not required to be filed in the tariffs, the Motion to Affirm argues that "expedited or delayed" service does require tariff specification and that it is immaterial that appellant offers through customary information memoranda and solicitors the two types of service equally to all shippers. Though arguing that published tariff rates necessarily apply only to "normal" service and that "expedited or delayed" service requires tariff specification as a departure

from "normal" service, the argument completely overlooks the fact that appellant renders only two types of lumber service—fast and slow—and has no "standard" of "normal" service, artificially set up for the purpose of argument in the Motion to Affirm.

Appellant's fast service is no more "normal" than its slow service, and could be called an "expedited" service in comparison with its slow service. But neither the fast nor the slow service is a "normal" or "special" service. Certainly, counsel for the Government is not at liberty to select either the fast or the slow service and use it, in the absence of a statutory "standard," to condemn, or measure the "legal quality" of the other service. Yet, the Motion to Affirm (pp. 7-9) argues that the slow service (but not the fast service) is a "privilege" or "facility" without specification in tariffs, in violation of section 6(7) of the Act because a shipper electing that service has for a longer time the "free use" (though at published tariff rates) of cars in which his lumber is hauled than he has if he elects appellant's fast service. But, since all shippers may, and do, elect either service, the argument is untenable for it merely is that by his election of the slow service a shipper gains an unlawful advantage over himself, and creates a discrimination against himself because he did not elect the fast service. And the argument is further untenable for it overlooks the fact that the fast service is more "expeditious" than the slow service, and is far more "advantageous" than the slow service under some conditions, as argued in cases cited in the Motion to Affirm, pages 10 and 12.

The Motion to Affirm argues that the slow service also results in concessions and advantages to shippers using that service whereby their property is transported at less than

tariff rates even though the tariff rates are admittedly collected and retained by appellant. The slow service, it is argued, is "necessarily a *pro tanto* reduction of the charge for the services required to be given." But this overlooks the fact that the tariff which publishes the rate or charge for the transportation services does not and—under the Government's own admission—is not required to specify any operating schedule or the type of service offered to be performed for the published rate. The fast service, being more expeditious, might well be more costly to appellant and advantageous to the shipper than is the slow service, and, thus, also result in the same kind of alleged reduction of the published tariff charge.

The Motion to Affirm further argues (p. 9) that the slow service results in discrimination against shippers who do not use it but must pay the same freight rate—plus demurrage—if they fail promptly to unload the cars at destination. But, as we have just demonstrated, this reasoning overlooks vital fundamentals which necessarily vitiate the argument. While the needs of some shippers may cause them to use one type of service more often than the other type, the availability of both services is not limited to any particular group of shippers but is offered to all, and the shipper who uses the fast service today might be, and often is, the same shipper who desires and uses the slow service tomorrow; or the same shipper might, and does, use both types of service for different shipments on the same day. The argument that the shippers using the fast service are discriminated against because they would have to pay demurrage *if* the shipments are not unloaded within the free time (48 hours) at destination is fallacious and untenable, for, regardless of fast or slow movement en route, demur-

rate is collectible on *all* shipments not unloaded within 48 hours after delivery at destination.

In arguing that, while operating time schedules for "normal" service are not required to be filed, the offering of "expedited or delayed" service must be filed in tariff form, we think the Motion to Affirm misconstrues the requirements concerning what must be filed in tariffs. While section 6(1) of the Act requires railroads to file tariffs showing all their "rates, fares and charges for transportation" and "all privileges and facilities" which "change, affect, or determine any part or the aggregate of such aforesaid rates, fares and charges, or the value of the service rendered to the passenger, shipper, or consignee" and further requires railroads to file and publish "all other charges which the Commission may require," there is no provision of law, and the Commission has never in the 73 years of its existence issued any order, rule or regulation expressly requiring railroads to publish their operating schedules or to state in tariff form the operating time or schedules of their trains or whether they propose to haul one train or one shipment faster than others.

Having selected and designated appellant's fast service as the only "normal" service that may be performed at the tariff rates, and, having thus established its own statutory "standard" of "normal" movement, the Government's argument is that appellant is forever prohibited from changing to any movement of traffic that requires more or less time than the so-called "normal" movement unless it publishes such change from the "normal" movement in tariff form and makes an extra charge therefor, in addition to the line-haul rates.

Such a view of the law would put such a strait-jacket around appellant as to prevent it from making any adjustment in its services to compete with longer routes at the same rates or to maintain any other schedule or time of movement of traffic than the so-called "normal" movement, regardless of appellant's needs or requirements of shippers.

Obviously, if appellant is bound to the so-called "normal" movement and may not lawfully alter the time of movement or establish another "normal" movement without making extra charges against shippers therefor, it cannot compete with other routes over which shippers are free to route their traffic at lower rates than the rates that would have to be charged by appellant for any deviation from what the Government regards as its "normal" service. Such rigidly enforced adherence to one fixed or "normal" movement of traffic would completely paralyze appellant's operations and its functioning in the transportation industry.

Such argument blinds itself to realities and to practices existing from the commencement of railroading without challenge under the law until the instant case. It is common public knowledge that railroads have always maintained more than one schedule or type of both freight and passenger service without charging different rates for different schedules or types of service.

For example, it is common public knowledge, publicized in appellant's passenger train timetables, that for many years appellant, in connection with other railroads, performed *three* different passenger services between Chicago and San Francisco. One of these services required 40 hours and 15 minutes, another 48 hours and 20 minutes and the

third 58 hours and 5 minutes. At that time the cost of a bedroom for two or more persons, not including Federal tax, on either of the three trains affording these different services was $46.15, regardless of the fact that passengers using the 58-hour service had the use or benefit of the bedroom and train service 18 hours longer than passengers occupying a similar bedroom on the train affording the 40-hour service, and 10 hours longer than passengers occupying a similar bedroom on the train affording the 48-hour service, and the basic railroad fare was the same for all three services, although for a time an extra charge was made for the fastest service because of the type of deluxe equipment that was afforded patrons of that train, but not on the others.

Under the Government's argument in the instant case, the fastest or 40-hour service must be regarded as "normal" and did not require tariff publication, but the 48-hour service and the 58-hour service were not "normal" and, therefore, should have been published in tariff form and an extra charge made therefor because the time required by the trip was different from that required by the "normal" 40-hour trip. Also passengers using the 58-hour service and the 48-hour service obtained the use of the bedroom and train facilities and the "contribution" of trackage and other railroad facilities for a much longer time than passengers using the 40-hour service. Paraphrasing the Government's term free "in car" storage, a passenger using the 58-hour service had the benefit of free "in bedroom" service 18 hours longer than passengers using the 40-hour service, and 10 hours longer than passengers using the 48-hour service and paid the same price for the longer use of the bedroom that passengers paid for the same bedroom for the other

types of service. While this illustration does not involve demurrage, it involves car use and car occupancy and the passengers using the 58-hour or the 48-hour service undoubtedly saved the cost of at least one night's hotel expense.

If, as the Government contends, shippers using appellant's slow service obtain more for their money through the use of facilities and privileges not published in tariffs, but which, the Government says, are of value to them, then it is undeniably true that passengers using the 58-hour service obtained excessive benefits and advantages which, under the Government's argument, must be treated in law as a concession resulting in the passenger's using the 58-hour service obtaining transportation at less than the published fare. But the Government has never challenged the varying passenger services at the same rates nor demanded that the different services or any of them be published in tariff form.

The vitiating fallacy of the Government's whole position in the instant case is that it attempts for the first time in the 73-year existence of the Interstate Commerce Act to make reasonableness of rates dependent entirely upon time in transit or type of service. Never before in the history of railroading or of the Interstate Commerce Commission has anyone attempted to reduce public use of railroad facilities to such Troy Weight fineness.

To further illustrate the absurdity of the Government's rigid adherence to a "normal" service and its view that any departure therefrom or change in time of movement must be published in tariff and an additional charge made for the change in service, it is common knowledge in the

transportation world, and particularly western railroads and shippers to and from the west coast, that, to compete with other western lines, appellant and connecting lines provided, prior to July 1, 1952, a seventh-morning delivery service at Chicago for perishable California fruit and vegetable traffic and that, on that date, because some of the other western lines had reduced the service to six days, appellant reduced its own service to sixth-morning delivery at Chicago. On November 2, 1958, to compete with certain other western lines which had already done so, appellant reduced the time of its service from sixth to fifth-morning delivery for California perishables at Chicago.

On westbound freight, in order to compete with other western lines which had reduced their schedules because of shipper demand and truck competition, appellant reduced its service on both perishable and dead freight from seventh to sixth-morning delivery from Chicago to California points and on March 12, 1958, under the same competitive circumstances, appellant reduced its westbound service from sixth to fifth-morning delivery from Chicago to California points. Although the service is now two days faster than it was in 1952, no change in the line-haul rates was made on account of this speeding up of the service and, although the availability of the service was given customary publicity through information circulars distributed to shippers by appellant's traffic representatives, the changes from seven days to six days and later to five days were not published in tariffs nor were any extra or additional charges made for the faster service.

The Government's argument that any change from what it calls "normal" service must be published in tariffs and some charge made therefor is wholly untenable because

there is no law, rule or regulation defining "normal" service and there is certainly no law automatically requiring an additional charge when what was previously "normal" service is changed to make a faster or slower service or when two or three services are performed for the same rate.

The rates charged must be "reasonable" and while the type and cost of performing the service, as well as its value to the shipper, are factors to be weighed in determining the reasonableness of rates to be charged, there has never been any law, rule or contention, until the Government made it in this case, that a charge which is "reasonable" for a "normal" service automatically becomes unreasonably low, thus requiring an additional charge or a higher rate, for performance of a service that is either faster or slower than the so-called "normal" service.

The district court held that in performing slow service for shippers electing it, appellant gives such shippers concessions from the published tariff rates resulting in transporting their property at less than the tariff rates and thus in violation of the Elkins Act. In other words, the argument is that shippers using appellant's slow service obtain their transportation at a less cost to them than the published tariff rates, although the Government admits that appellant collects and retains the full published tariff rates from those shippers. But the argument overlooks and ignores the fact that the cost to shippers using appellant's slow service is not one penny less than the tariff rate nor one penny less or more than the same shippers pay when they use the long circuitous routes, which are nearly twice as long as appellant's routes and necessarily require nearly twice, or more than twice the time in transit that is required for movement over appellant's routes. The long

circuitous routes, therefore, undeniably grant and give to shippers using them the same alleged concessions and advantages which the Government argues they obtain through the use of appellant's slow service; i. e., "in car" storage, longer use of trackage, motive power, other railroad facilities and cost of train crews.

Also, the long circuitous routes afford the shippers more time to find buyers for their shipments, save the shippers demurrage charges and give them the benefit of what the Government calls excessive per diem charges which the long routes must pay for foreign-line cars, and the cost to the long routes of switching and interchanging the cars from one carrier to another of the numerous lines comprising the long routes. In short, for the same tariff rates the long circuitous routes give the shippers nearly twice the number of miles of transportation service that they get when using appellant's slow service over its shorter, direct route. It is idle to argue that shippers using the long circuitous routes do not get any benefit or advantage out of nearly twice the miles of transportation service which, as shown, *infra,* page 12, from the Commission's own figures, cost the long routes $564 more per car to perform, than the same shippers get when using appellant's shorter direct routes.

As already observed, neither the district court nor the Government cite any provision of the Act or any order, rule or regulation of the Commission expressly prohibiting or condemning a railroad's performance of a slow service for the same tariff rate charged for a fast service. Instead, they seek support of the decision below by citing decisions of this Court and of other courts. While the cases cited in the decision below and in the Motion to Affirm abound with

dicta and gratuitous statements concerning the purposes of the Interstate Commerce Act and the Elkins Act, not one of them involves facts or circumstances comparable at all with those involved in the instant case. The decision and Motion quote from the dicta and academic statements in the cited cases but do not disclose the complete dissimilarity of facts which distinguish this case from those cited and make them inapplicable to the instant case.

Turner Lumber Co. v. C., M. & St. P. Ry. Co., 271 U. S. 259, was a suit by a shipper to recover four days' demurrage charges at ten dollars a day paid the railroad by the shipper on a carload of lumber during a car shortage. The shipper contended that the charge was unconstitutional and inflicted undue prejudice against lumber shippers. Neither section 6(7) of the Interstate Commerce Act nor the Elkins Act was involved, nor did the case involve competition of one railroad with others, nor line-haul service by one carrier to meet competition of another, or the type service required by shippers.

Chicago & Alton R. R. Co. v. Kirby, 225 U. S. 155, was an action *in assumpsit* by one shipper to recover damages for failure of the railroad to carry out a *special agreement* with the shipper to transport one shipment of horses from Springfield to Joliet, Illinois, in time to meet a "horse special" train of the Michigan Central Railroad, due to arrive in New York at a particular time which would enable Kirby's horses to be entered in a horse sale in New York. The regular tariff rates were to be charged. The Court held the contract unlawful for the principal reason that it placed the railroad under a liability different and more burdensome than its common law liability. The Court said

that for such special service and greater responsibility the railroad "might" exact a higher rate, but to do so the railroad must make and publish "a rate open to all." While the Court held that, if a higher rate were charged, it must be published, the crux of the decision clearly is that by making a special contract with Kirby for expedited service of a single shipment at the regular tariff rates a special advantage was given to him which was "not open to all." That decision does not require condemnation of appellant's slow service in the instant case for that service, as expressly found by the district court in findings 12 and 30 (R. 199 and 203), is "open to all" through the same type of publicity or dissemination of information to shippers of all operating schedules or types of service offered to shippers by appellant, and the service is undeniably offered to and performed alike for all shippers of all traffic, including "roller" and "firm order" lumber traffic. No extra charge or higher rate is made and no tariff publication is required under the *Kirby* decision.

Eastern Shore of Va. P. Exch. v. New York, P. & N. R. Co., 126 S. E. 674, was a suit for damages based on the railroad's failure to accomplish a shipper's order to "divert" two carloads of cabbage to Jersey City instead of New York, the original destination. Recovery was denied upon the court's holding that the diversion order amounted to a *special contract* with the one shipper to delay the shipment, and was, therefore, void. It is shown by the language at page 676 that the "possibility of discrimination between shippers" was the basis of that decision. There is no such possibility of discrimination in the instant case because appellant's slow service is admittedly offered to and performed alike for all shippers of all traffic.

Louisville & N. R. Co. v. Warren County S. G. Ass'n, 267 S. W. 551, was a suit for damages upon a special contract to deliver certain carloads of strawberries at New York within 78 hours and 45 minutes and at Philadelphia within 55 hours after departure from Bowling Green, Kentucky. The court denied recovery because the special contract with the one shipper "extended a discriminatory preference to it that no other shipper enjoyed under appellant's tariffs." Although the court said that if "time of delivery" is offered as a part of the service it should be published in tariffs, it is made clear at page 552 that this was merely to make the service "open to the shipping public at large, on equal terms." In the instant case appellant's slow service is unquestionably open to the shipping public at large and does not extend any discriminatory preferences to any shipper but is performed for all shippers alike upon equal terms. The service is not the result of special contracts with individual shippers but of the customary publicized information circulars advertising the availability of the service to the shipping public at large.

Atchison, T. & S. F. Ry. Co. v. Springer, 172 F. 2d 346, was a suit by the railroad to recover 47 days' demurrage on one carload of shavings or sawdust. After the car had arrived on the consignee's sidetrack the shipper gave a "diversion" or reconsignment order to the railroad's agent which order did not conform to tariff requirements because it was both verbal and conditional to the extent that it would have required the railroad employees to go on the consignee's private sidetrack, and to weigh the contents of the car. The court held the diversion order to be a nullity and ordered judgment for the railroad. The case bears no resemblance whatsoever to the case at bar.

Siebert v. Erie R. Co., 179 N. Y. S. 136, affirmed 134 N. E. 553, was a suit by a shipper to recover for the loss of certain freight from a car which had been temporarily left on a sidetrack en route "solely for the accommodation of the shipper." The court held that the agreement to leave the car on the sidetrack was unlawful and ordered judgment for the shipper. The court, at page 140, held that the agreement to extend this privilege to that shipper was unlawful because "other shippers paying the same rate for transportation" were not entitled to such accommodation under the bill of lading and tariffs of the railroad. The case does not aid the Government in the instant case because here appellant's slow service is admittedly offered to and performed for all shippers alike at exactly the same rates for transportation.

B. & O. R. Co. v. U. S., 305 U. S. 507, was a case in which the court sustained the validity of an order of the Interstate Commerce Commission condemning as unlawful a practice of certain railroads in the Port of New York furnishing and providing warehouse space and services to shippers at less than cost to the carriers and at less than the rates charged by private warehousemen. In the instant case the appellant collects and retains the published tariff rates and charges and provides only such facilities and performs only the services that are necessary and incident to the transportation services which it offers to perform to the public at the published tariff rates.

CONCLUSION

The judgment below should be reversed and the case remanded to the district court with directions to dismiss the Complaint and to remand the case to the Interstate Commerce Commission for full investigation of the practices of all railroads, including the circuitous routes as well as the direct routes, to the end of determining desirable uniformity and fair competitive relations among all railroads participating in the "roller" lumber traffic.

Respectfully submitted,

ELMER B. COLLINS,
Counsel of Record
for Appellant,
1416 Dodge St.,
Omaha, Nebr.

F. J. MELIA,
JAMES H. ANDERSON,
Attorneys for Appellant.

February, 1960.

PROOF OF SERVICE

I, ELMER B. COLLINS, counsel of record for appellant, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 1st day of February, 1960, I served copies of the foregoing Brief For Appellant on the adverse party, as follows:

1. On the United States of America by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Honorable J. Lee Rankin
Solicitor General of the United States
Department of Justice
Washington 25, D. C.

and with first-class postage prepaid to:

Roy L. Stephenson, Esq.
United States Attorney
202 U. S. Court House
Des Moines, Iowa

John C. Stevens, Esq.
Asst. United States Attorney
202 U. S. Court House
Des Moines, Iowa

2. On the Interstate Commerce Commission by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Daniel M. O'Donoghue, Esq.
Attorney
Bureau of Inquiry and Compliance
Interstate Commerce Commission
Washington 25, D. C.

ELMER B. COLLINS,
Counsel of Record
for Appellant.

APPENDIX

The pertinent provisions of the Interstate Commerce Act, 49 U.S.C., involved in this appeal are as follows:

Section 1 (3) (a)—

> "* * * The term 'railroad' as used in this chapter shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. The term 'transportation' as used in this chapter shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported. * * *."

Section 1 (4)—

> "It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; * * *."

Section 1 (10)—

> "The term 'car service' in this chapter shall include the use, control, supply, movement, distribution, exchange, interchange, and return of locomotives, cars,

and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains, by any carrier by railroad subject to this chapter."

Section 1 (14)—

"(a) The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this chapter, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for nonobservance of such rules, regulations, or practices."

Section 1 (15)—

"Whenever the commission is of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the commission may determine: (a) to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the commission; (b) to make such just and reasonable directions with respect to car service without regard to the ownership as between carriers of locomotives, cars, and other vehicles, during such emergency as in its opinion will best promote the service in the interest of the public and the commerce of the people, upon such terms of compensation as between

the carriers as they may agree upon, or, in the event of their disagreement, as the commission may after subsequent hearing find to be just and reasonable; (c) to require such joint or common use of terminals, including main-line track or tracks for a reasonable distance outside of such terminals, as in its opinion will best meet the emergency as between the carriers as they may agree upon, or, in the event of their disagreement, as the commission may after subsequent hearing find to be just and reasonable; and (d) to give directions for preference or priority in transportation, embargoes, or movement of traffic under permits, at such time and for such periods as it may determine, and to modify, change, suspend, or annul them. In time of war or threatened war the President may certify to the commission that it is essential to the national defense and security that certain traffic shall have preference or priority in transportation, and the commission shall, under the power herein conferred, direct that such preference or priority be afforded."

Section 6 (1)—

"Every common carrier subject to the provisions of this chapter shall file with the commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers

will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this chapter."

Section 6 (7)—

"No carrier, unless otherwise provided by this chapter, shall engage or participate in the transportation of passengers or property, as defined in this chapter, unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this chapter; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

The pertinent provisions of the Elkins Act, 49 U. S. C., involved in this appeal are as follows:

Section 41 (1)—

"Anything done or omitted to be done by a corporation common carrier, subject to chapter 1 of this title, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said chapter or under sections 41, 42, or 43 of this title, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in chapter 1 of this title or by sections 41, 42, or 43 of this title, with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to chapter 1 of this title to file and publish the tariffs or rates and charges as required by said chapter, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than $1,000 nor more than $20,000 for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said chapter whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said chapter, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concessions, or discrimination shall be deemed guilty of a misdemeanor,

and on conviction thereof shall be punished by a fine of not less than $1,000 nor more than $20,000; * * *."

Section 43—

"That whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discriminations forbidden by law, a petition may be presented alleging such facts to the circuit court of the United States sitting in equity having jurisdiction; and when the act complained of is alleged to have been committed or as being committed in part in more than one judicial district or State, it may be dealt with, inquired of, tried, and determined in either such judicial district or State, whereupon it shall be the duty of the court summarily to inquire into the circumstances, upon such notice and in such manner as the court shall direct and without the formal pleadings and proceedings applicable to ordinary suits in equity, and to make such other persons or corporations parties thereto as the court may deem necessary, and upon being satisfied of the truth of the allegations of said petition said court shall enforce an observance of the published tariffs or direct and require a discontinuance of such discrimination by proper orders, writs, and process, which said orders, writs, and process may be enforceable as well against the parties interested in the traffic as against the carrier, subject to the right of appeal as now provided by law. It shall be the duty of the several district attorneys of the United States, whenever the Attorney-General shall direct, either of his own motion or upon the request of the Interstate Commerce Commission, to institute and prosecute such proceedings, and the proceedings provided for by this Act shall not preclude the bringing of suit for

the recovery of damages by any party injured, or any other action provided by said Act approved February fourth, eighteen hundred and eighty-seven, entitled An Act to regulate commerce and the Acts amendatory thereof. And in proceedings under this Act and the Acts to regulate commerce the said courts shall have the power to compel the attendance of witnesses, both upon the part of the carrier and the shipper, who shall be required to answer on all subjects relating directly or indirectly to the matter in controversy, and to compel the production of all books and papers, both of the carrier and shipper, which relate directly or indirectly to such transaction; the claim that such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such person from testifying or such corporation producing its books and papers, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence documentary or otherwise in such proceeding: * * *."

APR 25 196
JAMES R. BROWNING,

No. 98

In the Supreme Court of the United States

October Term, 1959

o———o———o

UNION PACIFIC RAILROAD COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA.

o———o———o

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA,
WESTERN DIVISION

o———o———o

APPELLANT'S MOTION TO ENLARGE TIME FOR ISSUE OF JUDGMENT

o———o———o

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F. J. MELIA,
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In the Supreme Court of the United States

October Term, 1959

No. 98

UNION PACIFIC RAILROAD COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA, WESTERN DIVISION

APPELLANT'S MOTION TO ENLARGE TIME FOR ISSUE OF JUDGMENT

Now comes the Union Pacific Railroad Company, appellant in the above entitled cause, and respectfully moves that the time for issuance of the judgment of the Court in this cause be enlarged until May 25, 1960, for the following reasons:

1. On April 3, 1959, the United States District Court for the Southern District of Iowa issued findings of fact and conclusions of law holding that in providing a slow or delayed service in the transportation of lumber without the service being specified in published tariffs appellant violated § 6(7) of the Interstate Commerce Act and § 1

of the Elkins Act. The District Court thereupon issued summary judgment against appellant (R. 223) and an injunction, the last paragraph of which provides (R. 225)—

> "The Union Pacific Railroad Company, defendant, and its officers, agents, and servants be and they are hereby permanently enjoined and restrained from extending to any shipper or person any privileges or facilities of delay in the transportation or delivery of shipments of lumber, *unless and until such time, if at all, as there is in force with respect to the Union Pacific Railroad Company, defendant, a tariff lawfully on file with the Interstate Commerce Commission naming the rates and charges for such privileges or facilities.*" (Italics supplied.)

2. On appeal this Court affirmed by a per curiam opinion announced April 4, 1960, reading in part as follows:

> "* * * We agree with the District Court that such delayed service constitutes the furnishing of additional 'privileges or facilities' under § 6(7) of the Interstate Commerce Act, and, therefore, must be published and filed in its tariff. 49 U. S. C. § 6(1). See *Turner Lumber Co. v. Chicago, M. & St. P. R. Co.*, 271 U. S. 259, 262 (1926).
>
> "If and when appellant publishes and files such a tariff, as other roads have already done, the Commission can then consider the reasonableness and justness of appellant's service in the light of that rate, giving due regard to any unjust or unreasonable preferences or advantages that might result to shippers or other roads should the same not be approved."

3. Under Rule 59 of this Court the judgment will issue as of course after the expiration of twenty-five days from the date the judgment was entered, or immediately after April 29, 1960, unless the time is shortened or enlarged by an order of the Court.

4. In an effort to comply with the decisions of this Court and the District Court that its slow lumber service must be published and filed in tariff form, appellant on April 18, 1960, filed with the Interstate Commerce Commission paragraph (g), Item 215-C, Supplement 11 to Freight Tariff 6061-0, I. C. C. 5497 (copy of which is attached hereto as Appendix A), publishing its slow lumber service in tariff form. Under § 6(3) of the Interstate Commerce Act the tariff can not become effective except after thirty days' notice to the Commission and to the public, unless the Commission, in its discretion and for good cause shown, grants special permission allowing the tariff to become effective upon less than the required thirty days' notice. Since the statutory thirty-day period would not expire until May 19, 1960, appellant also filed with the Interstate Commerce Commission Sixth Section Application 2705 (copy of which together with letter of transmittal is attached hereto as Appendix B) for special permission of the Commission permitting publication of the tariff so as to become effective on less than the thirty-day statutory period, or on April 29, 1960, thus permitting the tariff to become effective before this Court sends its judgment down to the District Court. On April 22, 1960, the Commission denied the Sixth Section Application thus refusing to allow the tariff to become effective before this Court sends its judgment down to the District Court

5. The Commission may now allow the tariff to become effective on May 19, 1960, at the expiration of the full thirty-day statutory period, or it may, under the exercise of its power under § 15(7) of the Interstate Commerce Act, suspend and prevent the tariff from becoming effective for a period of seven months after May 19, 1960, and enter upon an investigation to determine the lawfulness of the tariff.

6. It is impossible for appellant to foretell which of the two courses the Commission may pursue; however, if the Commission allows the tariff to become effective at the end of the thirty-day statutory period on May 19, 1960, this Court's judgment presumably will have been issued and if the District Court promptly makes its injunction effective appellant would be faced with the injunction for a period of possibly fifteen days before its tariff could become effective. If the Commission suspends the tariff appellant will cease providing slow lumber service pending development of circumstances under which it may be lawfully restored.

7. The tariff which appellant has filed with the Commission, although not identical, is similar to and accomplishes the same purpose as rules now in effect in tariffs of certain other western railroads and under which those roads are now and will, unless and until the Commission finally determines their tariffs to be unlawful, continue furnishing slow or delayed lumber service, as described in the Commission's report in Investigation and Suspension Docket No. 7050, *Lumber—Free Time Allowance at Hold Points* (308 I. C. C. 247). That proceeding is still pending before the Commission upon petitions for reopening and reconsideration, as pointed out at page 21, footnote 6, of appellant's brief, and at page 10, footnote 3, of the Government's brief in this Court. In its application for special permission for its tariff to become effective on April 29, 1960, appellant states in next to the last paragraph on page 3 thereof, as follows:

> "* * * Whatever final disposition is made of those proceedings will be acceptable to the Union Pacific as disposition of the rule which we herein seek authority to make effective on April 29, 1960."

8. As the twenty-five day period provided by Rule 59 of this Court before issuance of judgment is five days less

than the thirty-day statutory period provided by § 6(3) of the Interstate Commerce Act for filing tariffs with the Commission it was impossible from the beginning for appellant to comply with the Court's decision that the slow service must be published in tariff form unless the Commission would grant special permission to publish the tariff on less than thirty days' notice, which it has refused to do, or unless this Court would enlarge the time for issuing its judgment to the District Court. And, as appellant has done everything within its power to get its tariff on file with the Commission and in effect, but has no way of ascertaining whether the Commission will let the tariff become effective at the expiration of the full thirty-day period on May 19, 1960, or suspend it before that date, appellant respectfully submits that the Court should not issue its judgment and that the present status should be maintained until the statutory administrative procedures required to permit appellant's tariff to become effective can have time to operate. See *City of Yonkers, et al., v. United States, et al.*, 321 U. S. 745.

9. Many hundreds of carloads of lumber from the West are now and are continuously en route in slow service on the route of the Union Pacific or numerous other available transcontinental routes. A large number of western shippers must have that type of transportation service and would be seriously damaged if it suddenly stopped. It seems clear that it is in the best interest of the numerous shippers and the carriers involved that appellant and any other carriers that may choose to follow the same pattern be permitted to publish such a tariff rule as appellant has filed with the Commission so that it can be reviewed by the Commission in the light of this Court's opinion in further proceedings which will undoubtedly be conducted by the Commission in its Investigation and Suspension Docket

7050, *Lumber—Free Time Allowance at Hold Points,* the final disposition of which appellant has agreed to accept.

Wherefore, Union Pacific Railroad Company, appellant, prays that the time for the issuance of the judgment of this Court be enlarged until May 25, 1960.

Respectfully submitted,

ELMER B. COLLINS,
Counsel of Record
for Appellant,
1416 Dodge Street,
Omaha 2, Nebraska.

F. J. MELIA,
JAMES H. ANDERSON,
Attorneys for Appellant.

April, 1960.

PROOF OF SERVICE

I, ELMER B. COLLINS, counsel of record for appellant, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 23rd day of April, 1960, I served copies of the foregoing Motion to Enlarge Time for Issue of Judgment on the adverse party. as follows:

1. On the United States of America by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Honorable J. Lee Rankin
Solicitor General of the United States
Department of Justice
Washington 25, D. C.

and with first-class postage prepaid to:

Roy L. Stephenson, Esq.
United States Attorney
202 U. S. Court House
Des Moines, Iowa

2. On the Interstate Commerce Commission by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Daniel M. O'Donoghue, Esq.
Attorney
Bureau of Inquiry and Compliance
Interstate Commerce Commission
Washington 25, D. C.

ELMER B. COLLINS,
Counsel of Record
for Appellant.

SUBJECT, EXCEPT AS OTHERWISE PROVIDED, TO ITEM X-212-A

APPENDIX A

SUPPLEMENT
TO
ICC 5497

UNION PACIFIC RAILROAD COMPANY

SUPPLEMENT 11

TO

FREIGHT TARIFF 6061-O
Supplements 6, 10 and 11 Contain all Changes.

RULES AND CHARGES

ON

DIVERSION OR RECONSIGNMENT OF FREIGHT

AND

HOLDING OF SHIPMENTS FOR INSPECTION, SURRENDER
OF BILLS OF LADING OR WRITTEN ORDERS

AT STATIONS ON THE

UNION PACIFIC RAILROAD COMPANY
CAMAS PRAIRIE RAILROAD COMPANY
YAKIMA VALLEY TRANSPORTATION COMPANY
BUTTE, ANACONDA & PACIFIC RAILWAY COMPANY

SEE ITEM 135 FOR INTERSTATE AND INTRASTATE APPLICATION

VERSION AND RECONSIGNMENT TARIFF

SUED APRIL 15, 1960 EFFECTIVE MAY 19, 1960

K. G. CARLSON
Freight Traffic Manager
Omaha, Nebraska

Issued by
E. A. LANDBERG, Chief of Tariff Bureau
1416 Dodge St., Omaha 2, Nebraska

SUPPLEMENT 11 TO UPRR TARIFF 6061-O

RULES AND OTHER GOVERNING PROVISIONS - SPECIAL RULES AND REGULATIONS

ITEM	SUBJECT	APPLICATION
55-C	EXPIRATION DATES	Items, rates or other provisions making reference hereto expire with the ... indicated below, unless sooner cancelled, changed or extended.

ITEM	PROVISIONS WHICH EXPIRE	DATE EXPIRING	FILE REFE...
215	Provision subject to (R) Reference Mark....	June 30, 1960.....	28-215-120
215	Provisions subject to (R) Reference Mark...	December 31, 1960.	28-215-126 80-199-15-...

SECTION 1

ITEM	SUBJECT	DIVERSION AND RECONSIGNING RULES
215-C (Con-tin-ued)	EXCEPTIONS	1. RULES 1 to 17, also Items 200, 205 and 210 will not apply to: (a) "Not used." (b) Grain; Seeds (field or grass); Screenings from grain, unground, containing not more than 5 per cent of flaxseed; Soy (Soya or Soja) Beans; ... Straw; Corn Husks or Corn Shucks; Pummies, unground and Alfalfa Meal, carlo... held or stopped for inspection and disposition orders, except as provided ... RULES 5 and 17. (See SECTION 3). (c) Bananas; Berries, other than cold pack; Cantaloupes; Cocoanuts (... not including other edible nuts); Corn, fresh or green, other than cold pack; ... Cranberries; Fruits, fresh or green, other than cold pack; Melons; Pineapple... or Vegetables, fresh or green, other than cold pack (including Potatoes and Onions) (See SECTION 2). (d) Coal, Coal Briquettes or Coke (See SECTION 5). (e) Traffic moved entirely within switching limits on which no road ... service is involved. (f) "Not used." (g) Live Stock (See SECTION 4). (h) Grain, Bran, Flour, Alfalfa Hay, Alfalfa Feed, Middlings, Seeds, Shorts, Peas or Beans, milled, sacked, bulked, clipped, mixed, blended, graded, dried, ste... or cleaned in transit under provisions of tariffs lawfully on file with t... Interstate Commerce Commission. Applies only at South-Central District "A" points on the UP (See Item 125). (i) Ore Concentrates and Matte sampled in transit as provided in UPR... Tariff 178-C, ICC 5409. (j) Lumber Products creosoted in transit at Pocatello, Idaho. 2. No diversion or reconsignment charge will be made: (a) For a single diversion or reconsignment if order for such diversi... or reconsignment is received by local freight agent at initial billing po... in time to permit instructions to be given to yard employees before car l... the yard at such initial billing point (subject to NOTE). NOTE - For the purpose of applying the rules in this tariff where ca... originate at non-agency stations, the initial billing point will be consid... the point of origin of the shipment. (b) "Not used." (c) Where a change in route is made necessary by embargo placed agai... the billed destination or route thereto subsequent to acceptance of the c... carrier at point of origin. (d) Where all charges have been paid to billed destination and deliv... accepted and a new bill of lading (not an exchange bill of lading) issued ... new destination on basis of the rate (not proportional, reshipping or tra... shipping rate applicable on traffic originating beyond the new point of o... applicable from the new point of origin shown in the new bill of lading ... without any carrier or agent of the carrier acting for the shipper. Such ... transaction will not be considered as a diversion or reconsignment under these rules. (e) For diversion or reconsignment of Grain and Seeds held or stopp... inspection under provisions of SECTION 3 of this tariff. (R)(f) For one diversion or reconsignment on interstate carload ship... of lumber or articles taking Lumber rates or arbitraries over the Lumber rates, while on the rails of the UP. (R)(g) Carload shipments of Lumber and articles taking Lumber rates ... arbitraries over Lumber rates when billed to destinations on the UP or v... UP through Omaha, Neb., Council Bluffs, Ia. or Kansas City, Mo. to destinati... beyond at rates and via routes published in TCFB Tariffs 17-T, 18-Q, 27-... ICC Numbers 1568, 1589, 1556 and 1581, respectively, may be consigned "Hold ... route for Orders" at no additional charge. Notwithstanding the provisions ... Agent H.R. Hinsch's Freight Tariff 4-D, ICC 4808 to the contrary, the UP w... at its own convenience, hold such cars without the assessment of demurrage ... charges for a period of not to exceed fifteen days at Pocatello and ... Ida., Ogden, Utah, Evanston, Green River, Rawlins, Laramie and Cheyenne, Wyo., ... North Platte or Grand Island, Neb. The fifteen day period will be computed ... 11:59 P.M. of the day of arrival at Pocatello, Ida. in the case of ship... moving through that point and from 11:59 P.M. of the day of delivery to ... at Ogden or Salt Lake City, Utah when shipments are received at those ... points.

SUPPLEMENT 11 TO UPRR TARIFF 6061-O

SECTION 1

SUBJECT	DIVERSION AND RECONSIGNING RULES
EXCEPTIONS	2. No diversion or reconsignment charge will be made: Shipping order and waybill must specify "Hold Enroute for Orders" and must also show name and address of individual or firm to be notified when shipments are on hand at Omaha,Neb.,Council Bluffs,Ia. or Kansas City,Mo. The UP will notify designated individual or firm when shipments are on hand at Omaha,Neb.,Council Bluffs,Ia. or Kansas City,Mo.,as the case may be,and request instructions for disposition. The rules,regulations and charges published in Agent H.R. Hinsch's Freight Tariff 4-D,ICC 4808 will become applicable after such notice has been given. (21)(E) Expires as indicated in Item 155-C.

EXPLANATION OF REFERENCE MARKS

REFERENCE MARK		EXPLANATION
4	B	Denotes Reduction.

B - Brought forward without change.

THE END

APPENDIX B

April 15, 1960

File: W -

Mr. H. E. Warren, Chief
Special Permission Branch
Bureau of Traffic
Interstate Commerce Commission
Washington 25, D.C.

Dear Mr. Warren:

This has reference to my conversation with you earlier this week about the publication of a rule by the Union Pacific relating to the transportation of lumber and forest products.

Attached you will find the original and one copy of my Sixth Section Application 2705 which I will appreciate having you substitute for the Sixth Section Application which I prepared in Washington and left on file with you.

The Union Pacific has, as was informally suggested to me, published the proposed rule on statutory notice to become effective May 19th and we now seek authority to republish that rule on short notice effective not earlier than April 29th. In this new Sixth Section Application I have stated on Page 3 that whatever final disposition the Commission makes of the tariff items of other carriers that are involved in I&S Dockets 7050 and 7208 will be acceptable to the Union Pacific as a basis for disposing of the rule which we have now published and wish to republish effective by April 29th.

Will you please advise Mr. C. G. Dankmyer, General Traffic Agent for the Union Pacific at Washington, D.C., telephone Republic 7-0600, what action is taken by the

Commission in connection with this Sixth Section Application.

Yours very truly,

A. J. STILLING

cc: Mr. C. G. Dankmyer, G.T.A.
Union Pacific Railroad
Washington 5, D.C.

UNION PACIFIC RAILROAD COMPANY

Omaha 2, Nebraska

Sixth Section Application 2705 Special Permission No.——

To The Interstate Commerce Commission, Washington, D.C. April 15, 1960

The Union Pacific Railroad Company, by A. J. Stilling, its Ass't. Frt. Trf. Mgr., does hereby respectfully petition the Interstate Commerce Commission that it be permitted, under Section 6 of the Interstate Commerce Act, as amended, to republish and put in force the following rules and regulations to become effective on less than statutory filing thereof with the Interstate Commerce Commission but not earlier than April 29, 1960:

To republish the new Paragraph (g) of Item 215-series as shown in the attached Supplement 11 to Union Pacific Tariff 6061-0, I.C.C. 5497.

Your petitioner further represents that the said rules or regulations, above mentioned, will be published in consecutively numbered supplement to UPRR Tariff I.C.C. 5497.

And your petitioner further bases such request upon the following facts, which present certain special circumstances and conditions justifying the request herein made:

On April 3, 1959, the United States District Court for the Southern District of Iowa issued an injunction reading in part as follows:

> "The Union Pacific Railroad Company, defendant, and its officers, agents, and servants be and they are hereby permanently enjoined and restrained from extending to any shipper or person any privileges or facilities of delay in the transportation or delivery of

> shipments of lumber, unless and until such time, if at all, as there is in force with respect to the Union Pacific Railroad Company, defendant, a tariff lawfully on file with the Interstate Commerce Commission naming the rates and charges for such privileges or facilities."

Thereafter the District Court, upon showing by the Union Pacific that it had appealed to the Supreme Court of the United States, stayed or suspended the effectiveness of its injunction to enable the Union Pacific to continue its slow lumber service pending final decision of the appeal by the Supreme Court. The Court felt that it would be unfair and unjust to compel the Union Pacific to stop providing its slow lumber service while all other competing carriers would continue to provide such service.

On April 4, 1960, the Supreme Court of the United States rendered a per curiam decision affirming the judgment of the District Court. The Supreme Court stated that it agreed with the District Court that Union Pacific's delayed lumber service constitutes "privileges or facilities" under Section 6(7) of the Interstate Commerce Act, and therefore "must be published and filed in its tariff." The final paragraph of the Supreme Court's decision reads as follows:

> "If and when appellant publishes and files such a tariff, as other roads have already done, the Commission can then consider the reasonableness and justness of appellant's service in the light of that rate, giving due regard to any unjust or unreasonable preferences or advantages that might result to shippers or other roads should same not be approved."

The Supreme Court's rules of practice expressly require that the Supreme Court's mandate or judgment will be forwarded to the District Court at the expiration of 25 days following the date on which the Supreme Court

rendered its decision, or in other words immediately after April 29. The 25-day period is 5 days less than the 30-day statutory requirement for filing tariffs with the Commission, and therefore obviously necessitates permission for the Union Pacific to file its proposed tariff upon less than statutory notice. If short notice is not granted so that the proposed rule can become effective not later than April 29, 1960, the District Court upon receipt of the mandate or order of the Supreme Court will be required to make its injunction effective unless the Union Pacific can show to the District Court that the Union Pacific has on file and effective upon short notice its tariff rule which both the District Court and the Supreme Court clearly intended or contemplated that the Union Pacific would file with the Commission. In the circumstances, short notice filing of the Union Pacific's proposed tariff rule is essential to enable the Union Pacific to continue in its slow lumber service in competition with the several other railroads whose slow lumber service was investigated and still is under reconsideration by the Commission in I&S Docket No. 7050, Lumber, Free Time Allowance at Hold Points, 308 I. C. C. 247.

The tariff rule to be published by the Union Pacific, although not identical, is similar to and accomplishes the same purpose as rules now in effect in the following tariffs of other Transcontinental and Midwestern railroads:

M-StL 41-Q, I.C.C. 87, Item 25-D
Soo Line 226-R, I.C.C. 7490, Item 90-E
CGW 40-C, I.C.C. 5617, Item 140-C
CRI&P 32017-R, I.C.C. C 13584, Item 359-C
IC 13075-S, I.C.C. A 11738, Par. 6-A, Sec. 1, Note 2
C&NW 16390-W, I.C.C. 11362, Item 20-C, Note 2
CMStP&P 15800-M, I.C.C. B 7891, Item 65-E
CP 1006-G, I.C.C. W 1070

Many hundreds of carloads of lumber from the west are now and continuously enroute in delayed and hold service on the Union Pacific and the numerous other available transcontinental routes. A large number of western shippers must have that type of transportation service and would be seriously damaged if it is suddenly discontinued. It seems clear that it is in the best interests of not only the numerous shippers involved and the carriers, but the Commission as well, that the Union Pacific and any other carriers that may choose to follow the same pattern, be permitted to publish a rule as proposed herein so that the overall situation can be reviewed by the Commission in the light of the court's opinion and in the further proceedings that will undoubtedly be conducted by the Commission in its I&S Dockets 7050 and 7208 and also Docket 33172. Whatever final disposition is made of those proceedings will be acceptable to the Union Pacfiic as disposition of the rule which we herein seek authority to make effective on April 29, 1960.

If this program is followed it is possible that whatever conclusions may finally be reached by the Commission can be carried out with little or no harm to any of the large number of interested shippers and carriers involved.

UNION PACIFIC RAILROAD COMPANY

By A. J. Stilling
Ass't Frt. Trf. Mgr.

Subscribed and sworn to before
me this 15th day of April, 1960.

E. A. Landberg
Notary Public

SUPREME COURT OF THE UNITED STATES

No. 98.—October Term, 1959.

Union Pacific Railroad Co., Appellant, *v.* United States of America.	On Appeal From the United States District Court for the Southern District of Iowa.

[April 4, 1960.]

Per Curiam.

Appellant, along with other railroads, has for years engaged in the "roller lumber traffic" by performing intentionally delayed service in the transportation of lumber from the West Coast to market. Six roads so engaged have filed tariffs covering such services at the same rate as their fast freight, and the Interstate Commerce Commission now has such tariffs under investigation and consideration. Appellant, however, has refused to file a tariff covering such service but continues to handle roller lumber traffic on the same tariff as its fast freight.

The appellee, at the instance of the Interstate Commerce Commission, sought and obtained a permanent injunction restraining appellant from performing its roller lumber traffic service until it publishes and files a tariff covering the same. The District Court found that appellant renders a 14-day delayed lumber service over a route ordinarily requiring from two to four days. The delay is accomplished by the holding of cars on sidings at certain points on its trunk lines awaiting diversion orders to move the shipment forward over the railroad's regular service. This affords the shipper additional time to find a market for the lumber while it is in transit. This service, the District Court found, incurred additional "operational problems and costs" for appellant, including switching, siding, storage and "per diem cost for the use of foreign cars" not present in its fast freight service and not

included in its published tariff. We agree with the District Court that such delayed service constitutes the furnishing of additional "privileges or facilities" under § 6 (7) of the Interstate Commerce Act, and, therefore, must be published and filed in its tariff. 49 U. S. C. § 6 (1). See *Turner Lumber Co.* v. *Chicago, M. & St. P. R. Co.*, 271 U. S. 259, 262 (1926).

If and when appellant publishes and files such a tariff, as other roads have already done, the Commission can then consider the reasonableness and justness of appellant's service in the light of that rate, giving due regard to any unjust or unreasonable preferences or advantages that might result to shippers or other roads should the same not be approved.

Affirmed.